TENAGA NASIONAL BHD v. EVERGROWTH AQUACULTURE SDN BHD & OTHER APPEALS

FEDERAL COURT, PUTRAJAYA
AZAHAR MOHAMED CJ (MALAYA)
MOHD ZAWAWI SALLEH FCJ
ABDUL RAHMAN SEBLI FCJ
ZALEHA YUSOF FCJ
RHODZARIAH BUJANG FCJ
[CIVIL APPEAL NOS: 02(f)-34-05-2018(W), 02(f)-23-03-2020(B), 02(f)-6-02-2021(J) & 02(f)-8-02-2021(J)]
8 SEPTEMBER 2021

UTILITIES: *Electricity – Tampering of meter – Claims of loss of revenue – Whether electricity supplier could rely on reg. 7 of Licensee Supply Regulations 1990 ('LSR') to enter consumer's premise to obtain remedy under s. 38(3) of Electricity Supply Act 1990 ('ESA') without complying with requirements under s. 5 – Whether phrase 'at all reasonable times' in reg. 7 of LSR allows electricity supplier to conduct inspection of meter during operational activity or business hours of consumer – Discovery of metal clamp affixed to meter at consumer's premises – Whether sufficient in law to hold that there was meter tampering for purposes of s. 38(1) and 38(3) of ESA – Whether limitation starts to run from date meter was tampered with or from date meter tampering allegedly discovered – Whether aggravated or exemplary damages must be pleaded*

The following four appeals were heard together on common issues of law in claims by Tenaga Nasional Berhad ('TNB') for loss of revenue due to meter tampering pursuant to ss. 38(3) to (5) of the Electricity Supply Act 1990 ('the ESA'): (i) Civil Appeal No. 02(f)-34-05-2018(W) (*TNB v. Evergrowth Aquaculture Sdn Bhd*); (ii) Civil Appeal No. 02(f)-23-03-2020(B) (*Tetangga Bahagia SdnBhd v. TNB*); (iii) Civil Appeal No. 02(f)-6-02-2021(J) (*Megahock Pipes & Profile Manufacturing Sdn Bhd v. TNB*); and (iv) Civil Appeal No. 02(f)-8-02-2021(J) (*Megahock Pipes & Profile Manufacturing Sdn Bhd v. TNB*). The common party to these appeals was TNB, who was the appellant in one of these appeals and the respondent in the other three. The other parties will be referred to by their names where necessary, but their shared commonalities grouped them to be referred to as 'the consumers.' The questions of law in respect of which leave applications to appeal were allowed in the four appeals may be categorised and framed into the following six common issues of law: (i) whether TNB could rely on reg. 7 of the Licensee Supply Regulations 1990 ('LSR') to enter the consumer's premises in order to obtain a remedy under s. 38(3) of the ESA without complying with the requirements under s. 5 of the ESA and whether the phrase 'at all reasonable times' in reg. 7 of the LSA only allows for TNB to conduct an

inspection of its meter at the consumer's premises during the operational activity or business hours of the consumer; (ii) whether TNB's discovery of a metal clamp affixed to its meter at a consumer's premises is sufficient in law for the court to hold that there was meter tampering for the purposes of s. 38(1) and 38(3) of the ESA 1990; (iii) whether limitation under s. 6 of the Limitation Act 1953 ('LA 1953') starts to run from the date the meter was alleged to have been tampered with or from the date the meter tampering was alleged to have been discovered; (iv) whether significant errors in TNB's calculation for loss of revenue would lead to a dismissal of TNB's claim or whether the court should substitute an alternative amount for the claim; (v) whether aggravated or exemplary damages must be pleaded for the court to order it as a relief to the successful party; and (vi) whether in adjudicating the fairness and reasonableness of the loss of revenue claimed, the Energy Commission's Guideline and the compliance thereof in computing the loss of revenue is an overriding consideration that excludes the consideration of other contrary evidence which may vitiate the operation thereof and the sum that may be lawfully claimed ('the Energy Commission's Guideline Point').

Held (order accordingly)

Per Azahar Mohamed CJ (Malaya), Mohd Zawawi Salleh, Abdul Rahman Sebli, Zaleha Yusof, Rhodzariah Bujang FCJJ delivering the judgment of the court:

(1) The full provision of s. 38 of the ESA, in plain and ordinary reading, provides the overarching mechanism of disconnection of electrical supply and the provision of remedies out of that situation. Two principles must be borne in mind. In the first place, when there is amendment to a written law, the law must be read from the latest amendment and shall be given effect to it. Therefore, s. 38 must be read in its present form in its latest amendment. If the words of the latest amendment provision is clear, then the court has the duty to expound its clear language, unless ambiguity arises, resort must be taken to the purposive approach. Secondly, a provision must be read in its entirety and its provision must not be read independently so as to construe the wholesome meaning of the said provision. Section 38 must then be read as a whole to ascertain the real meaning of the provision as intended by the Legislature (paras 24 & 25)

(2) Under the scheme of the provisions of s. 38 of the ESA the licensee such as the TNB, or by anyone it employed, once they enter, inspect and make finding of any evidence of the consumer committing any offence under s. 37(1), (3) and (4) shall inform the Energy Commission ('EC') within a prescribed time to cause the disconnection of the electrical supply in the consumer's premise. Once the licensee obtained its finding, it shall be submitted to the EC for verification. The EC's

verification shall determine the disconnection or reconnection of the electrical supply. Out of that finding of offence which may be verified by the EC, the licensee may claim for the loss of revenue from the consumer with the exception that if the licensee does not proceed with a claim for such loss of revenue and expenses in court, the licensee may only claim against the consumer for the said loss of revenue and expenses for a period not exceeding six months retrospectively from the date the offence was discovered. The provision does not expressly or specifically provide for any conditions or procedure that must be complied by the licensee in making an entry and inspection. (para 26)

(3) TNB is not required to comply with ss. 5 and 6 of the ESA for purposes of its inspection under s. 38 of the ESA. TNB's right under s. 38 of the ESA is not subject to ss. 5 and 6 of the ESA. As such, no issue of trespass arose from the said non-compliance. There were two connected reasons for this. First and foremost, ss. 5 and 6 of the ESA are in respect of the powers of the EC to investigate the commission of offences under s. 37 of the ESA or any Regulations made pursuant to the ESA. The EC's powers under ss. 5 and 6 of the ESA are in respect of its criminal jurisdiction for purposes of identifying the perpetrator of the offences under the ESA. As provided under ss. 42 and 43, this would be for the purposes of criminal action. It is a criminal enforcement jurisdiction. Quite the opposite, TNB's power and/or right to enter its consumers' premises under s. 38(1) of the ESA (read with reg. 7 of the LSR) are in respect of ensuring the supply of electricity to the consumers and the functionality of the meter to ascertain the consumer's consumption. This power is clearly in respect of TNB's right under a civil claim for loss of revenue due to meter tampering. The EC's powers under ss. 5 and 6 and the TNB's right to a civil claim under s. 38 is found under different parts of the ESA *ie,* under Part III (Functions, Duties and Powers of Commission) and Part IX (Offences and Penalty) respectively. The provisions under these separate parts of the ESA do not overlap nor do they expressly refer to one another. The powers therein are separate and independent of one another. It is impermissible to relate and/or apply them in an overlapping manner. The second reason why this court took the view that TNB's right under s. 38 of the ESA is not subject to ss. 5 and 6 is on the basis of the decision of this court in *TNB v. Ichi-Ban & Other Cases* ('*Ichi-Ban*') where it was decided *inter alia* that ss. 38 and 37 of the ESA are independent of each other, in that, one refers to civil claims and the other refers to criminal prosecution. Consequently, as both ss. 37 and 38 of the ESA were ruled by this court in *Ichi-Ban* to be independent of each other, supported by the wholesome reading of s. 38 and its legislative history, it failed to trigger and to attract ss. 5 and 6 of the ESA which govern the process in criminal jurisdiction

enforcement to hold TNB for compliance. It is absurd to interpret s. 38 to trigger ss. 5 and 6 when both the provisions are intended by the Legislature to serve different purposes. This is the most harmonious reading for the interpretation of s. 38 which this court would adopt. (paras 28-30)

(4) The 'at all reasonable time' issue concerned with the definition and scope of reg. 7. This phrase has not been defined in the LSR itself. In the first place, the ESA or the LSR does not expressly or specifically provide for any restriction or limitation as to when the inspection of meters may be conducted by TNB. The relevant portion of the phrase in this issue is 'the licensee may at any reasonable time.' In plain and ordinary meaning, reg. 7 confers the discretionary powers to the licensee to enter the consumer premises at all reasonable time. The context of 'at all reasonable time' must be as what the heading of reg. 7 provides, which is 'during the continuance of supply.' The poser here lies as to the meaning of 'during continuance of supply' and 'at all reasonable time'. The answer rests in the time when the licensee reasonably and practically suspects that the offence of meter tampering ought to occur. This was for two reasons (i) the meaning of 'during continuance of supply' must be interpreted to not necessarily mean only to refer to the operational hours of the consumer's premise. In a meter tampering case, it is not beyond the trail of logic that the duration of 'continuance of supply', may begin from the discovery of the offence. This essentially means, what constitute a continuance of supply is inclusive of when the consumers tempered the meter for a longer and cheaper use of electricity. In this instance, technically, the 'continuance of supply' still runs from that point of discovery, a *fortiori* that s. 38(3) allows for claim for loss of revenue from the date the offence was discovered which was affirmed by this court in *Ichi-Ban*. There is always a continuance of supply of electricity, even outside the business or operational hours of the consumer. The utility of reg. 7 of the LSR cannot therefore be limited or restricted to the business or operational hours of the consumer; and (ii) the entry ought to have been made during the duration where the offence of meter tampering reasonably ought to be committed. As the meter tampering is an offence, it is indisputably illogical for an 'offence' to be committed within the 'operational hours' of the consumers' premises. It would be highly more probable for a meter to be tampered with at the time when premises cease to operate at their operational time. Logic and common-sense dictates, a meter tampering is considered by the Legislature as an offence only because the nature of its commission is out of the normal operational hours. To limit entry for inspection to the business or operational hours of the consumer, would allow for meter tampering outside the business or

operational hours of the consumer with the use of non-permanent methods of tampering such as the metal clamp. This is the mischief that the Legislature intended to overcome and this court should not hesitate to expound so. Reading both of the meanings in this manner would allow harmonious reading and conform to the Legislature's intention on the overarching interplay between s. 38 and reg. 7 to the practical aspect of a meter tampering case. Thus, what constitutes 'at all reasonable time' was a question of fact which would very much depend on the facts and circumstances of each case. (paras 38-45)

(5) The question of irrebuttable or rebuttable presumptions does not arise insofar as s. 38(1) of the ESA is concerned. This is simply an inference that can be logically drawn from established facts. There is a rational relationship between the discovery of metal clamp and the inference to make that the customer caused the diversion to prevent full registration, reading and/or recording of electricity consumption by the meter. The fixing of a metal clamp at the Test Terminal Block of TNB's meter leads to one logical conclusion that the meter had been tampered with. The law of evidence recognises an abundance of inculpatory evidence and/or circumstances that leads to a single logical conclusion. It simply meant that the court is required to make logical inference and to attribute meaning to the evidence. It is common knowledge that TNB installs a meter to record the electricity consumption of its consumers. The readings of the meter would determine the electricity charges to be paid by the consumers to TNB. These metal clamps were not part of TNB's meter. It was irrefutable that the function of the metal clamp was to circumvent and/or interfere with the actual reading or recording of the electricity consumption by TNB's meter. The use of a metal clamp was intended to be a non-permanent form of tampering with TNB's meter, as it was easily removed to avoid detection. It is open to the defence to challenge the inference's reasonableness. The respondent is at liberty to adduce direct or circumstantial evidence during the trial that would break the obvious connection between consumption of the electricity and the inference that the meter had been tampered with and caused the diversion and the inference could be reasonably and logically drawn. It is incumbent upon the court to resolve conflicts in the testimony, to weigh the evidence from all angles and perspective and determine whether the inferences were reasonable based upon the combined effect and cumulative force of all the evidence adduced before the court. (paras 70-74)

(6) A civil cause of action under s. 38(3) to (5) of the ESA only occurs upon TNB's discovery of the meter tampering during the inspection under s. 38(1) of the ESA. The cause of action envisaged under s. 38(3) and

(5) of the ESA is a statutory claim, where the right to recover or the relief is specifically stipulated therein. The cause of action is independent of any common law claim for tort or breach of contract. Thus, as the cause of action starts from the discovery of meter tampering, limitation period starts therefrom onwards. (paras 79-82)

(7) Since the ESA is silent on the methodology to be used by TNB to calculate the loss of revenue it suffered due to meter tampering, Parliament has left the process of ascertainment to TNB because of the difficulties inherent in this type of claim. It was neither possible nor logical to expect TNB to provide an accurate calculation of the revenue loss suffered. The question on whether TNB's method of calculation for back billing and expenses under s. 38(4) of the ESA, upon its discovery of meter tampering, entitled the court to either grant the full sum claimed by TNB as loss of revenue and expenses, or should the court make an order for damages to be assessed to take into account any significant errors in the calculation, was irrelevant and did not require any answer by this court. The question presupposed that there was a finding of error in the calculation of the back-billed amount when there was no such finding by the High Court and the Court of Appeal. As neither the trial judge nor the Court of Appeal made any finding of any error in the back billing computation, the question ought to be dismissed. (paras 89-92)

(8) In a case of meter tampering, although TNB is entitled to legally pursue a claim for unjust enrichment, there must be a proper and specific plea in the statement of claim that its cause of action is so founded and material particulars that give rise to it must be provided in the pleading. Obviously, the use of the metal clamp to tamper with the meter is an act to profit from the lower usage of electricity, thereby causing wrongful gain to the perpetrator and wrongful loss to TNB. Thus, it was a form of unjust enrichment. However, when this court examined TNB's statement of claim, not only was exemplary damages not pleaded but more importantly, the fact giving rise to and justifying the grant of exemplary damages were not pleaded. Although a claim for punitive damages may be awarded in an exceptional case in contract, it must be specifically pleaded because a person should not be punished without adequate advance notice of the charge. Hence, aggravated or exemplary damages must be pleaded for the court to order it as a relief to the successful party. (paras 94, 101 & 102)

(9) It is axiomatic that a consumer must pay for the electricity it consumes. Once meter tampering is proved, the court must determine the loss of revenue suffered by TNB and recoverable against the consumer. This has to be so as the principle is that TNB's consumer must pay for the electricity consumed and not be allowed to benefit from the tampering of meters to pay less. If despite proof of meter tampering, TNB's claim was to be completely dismissed, it would result in TNB having to unnecessarily and unfairly suffer from the mischief that Parliament had intended to protect it from. The remedy expressly provided by s. 38 of the ESA to protect TNB's interest against meter tampering would thus be rendered nugatory. Thus, if the court found that there was significant error in TNB's calculation for loss of revenue, an order for damages to be assessed may be made, taking the error into account of course. Subsequent to these reasonings, this court declined to answer the question raised regarding the Energy Commission's Guideline point as they were not confined to issues of law as they raised factual and evidential issues. (paras 110-113)

Bahasa Melayu *Headnotes*

Empat rayuan berikut didengar bersama berkenaan isu-isu umum dalam tuntutan oleh Tenaga Nasional Berhad ('TNB') atas kehilangan pendapatan akibat gangguan meter berdasarkan ss. 38(3) hingga (5) Akta Bekalan Elektrik 1990 ('ABE'): (i) Rayuan Sivil No. 02 (f) -34-05-2018(W) (*TNB v. Evergrowth Aquaculture Sdn Bhd*); (ii) Rayuan Sivil No. 02 (f) -23-03-2020(B) (*Tetangga Bahagia Sdn Bhd v. TNB*); (iii) Rayuan Sivil No. 02(f)-6-02-2021(J) (*Megahock Pipes & Profile Manufacturing Sdn Bhd v. TNB*); dan (iv) Rayuan Sivil No. 02(f)-8-02-2021 (J) (*Megahock Pipes & Profile Manufacturing Sdn Bhd v. TNB*). Pihak yang sama dalam rayuan ini adalah TNB, yang merupakan perayu dalam salah satu rayuan ini dan responden dalam tiga yang lain. Pihak-pihak lain akan dirujuk dengan nama mereka jika perlu, tetapi persamaan antara mereka menggabungkan mereka agar disebut sebagai 'pengguna-pengguna'. Persoalan-persoalan undang-undang yang timbul berkaitan permohonan kebenaran untuk merayu dibenarkan dalam empat rayuan boleh dikategorikan dan dibentuk menjadi enam isu-isu umum berikut: (i) sama ada TNB boleh bergantung pada peraturan 7 Peraturan-Peraturan Bekalan Pemegang Lesen 1990 ('PBPL') untuk memasuki premis pengguna untuk mendapatkan remedi bawah s. 38(3) ABE tanpa mematuhi syarat bawah s. 5 ABE dan sama ada ungkapan 'pada semua masa yang munasabah' dalam peraturan 7 PBPL hanya membenarkan TNB melakukan pemeriksaan meternya di premis pengguna semasa aktiviti operasi atau waktu perniagaan pengguna ('Titik Kemasukan dan Pemeriksaan'); (ii) sama ada penemuan pengapit logam yang dilekatkan pada meternya di premis pengguna oleh TNB memadai dari segi undang-undang untuk mahkamah berpendapat bahawa terdapat gangguan meter untuk tujuan s. 38(1) dan 38(3) ABE;

(iii) sama ada had masa di bawah s. 6 Akta Had Masa 1953 ('AHM') bermula dari tarikh meter itu didakwa telah diganggu atau dari tarikh gangguan meter didakwa telah ditemui; (iv) sama ada kesalahan ketara dalam pengiraan TNB untuk kehilangan pendapatan akan menyebabkan penolakan tuntutan TNB atau sama ada mahkamah harus menggantikan jumlah alternatif untuk tuntutan tersebut; (v) sama ada ganti rugi teruk atau teladan mesti diplidkan agar mahkamah boleh membuat perintah sebagai relief kepada pihak yang berjaya; dan (vi) sama ada dalam menilai keadilan dan kewajaran kehilangan pendapatan yang dituntut, Garis Panduan Suruhanjaya Tenaga dan pematuhannya dalam mengira kerugian pendapatan adalah pertimbangan utama yang tidak termasuk pertimbangan keterangan bertentangan lain yang boleh menggegarkan operasi dan jumlah yang mungkin dituntut secara sah ('titik Garis Panduan Suruhanjaya Tenaga').

Diputuskan (perintah sewajarnya)
Oleh Azahar Mohamed HB (Malaya), Mohd Zawawi Salleh, Abdul Rahman Sebli, Zaleha Yusof, Rhodzariah Bujang HHMP menyampaikan penghakiman mahkamah:

(1) Peruntukan penuh s. 38 ABE, dalam bacaan biasa, memperuntukkan mekanisme menyeluruh pemutusan bekalan elektrik dan peruntukan-peruntukan remedi dari keadaan itu. Dua prinsip mesti diambil kira. Pertama, ketika terdapat pindaan terhadap undang-undang tertulis dibuat, undang-undang harus dibaca dari pindaan terbaru dan diberikan kesan kepadanya. Oleh itu, s. 38 mesti dibaca dalam bentuk semasa mengikut pindaan terbarunya. Sekiranya kata-kata peruntukan pindaan terbaru jelas, maka mahkamah mempunyai kewajipan untuk menjelaskan dalam bahasa yang terang, kecuali jika timbul kekaburan, pendekatan bertujuan harus diambil. Kedua, peruntukan mesti dibaca secara keseluruhan dan peruntukannya tidak boleh dibaca secara bebas dan tersendiri sehingga mewujudkan maksud yang menyeluruh dari peruntukan tersebut. Seksyen 38 harus dibaca secara keseluruhan untuk memastikan maksud sebenar peruntukan sebagaimana diniatkan oleh badan perundangan.

(2) Di bawah skema peruntukan s. 38 ABE, pemegang lesen seperti TNB, atau oleh sesiapa sahaja pekerjanya, setelah mereka masuk, memeriksa dan membuat penemuan bukti pengguna melakukan kesalahan bawah s. 37(1), (3) dan (4), akan memaklumkan Suruhanjaya Tenaga ('ST') dalam tempoh masa yang ditentukan untuk memutuskan bekalan elektrik di premis pengguna. Setelah pemegang lesen memperoleh penemuannya, ini akan diserahkan pada ST untuk pengesahan. Pengesahan ST akan menentukan pemutusan atau penyambungan semula bekalan elektrik. Daripada penemuan kesalahan yang mungkin disahkan oleh ST, pemegang lesen boleh menuntut kehilangan hasil

daripada pengguna dengan pengecualian bahawa, jika pemegang lesen tidak meneruskan tuntutan kehilangan pendapatan dan perbelanjaan tersebut di mahkamah, pemegang lesen hanya boleh menuntut terhadap pengguna atas kehilangan pendapatan dan perbelanjaan tersebut untuk jangka masa tidak melebihi enam bulan secara retrospektif dari tarikh kesalahan itu ditemui. Peruntukan tersebut tidak secara jelas atau khusus memperuntukkan syarat atau prosedur yang mesti dipatuhi oleh pemegang lesen dalam membuat kemasukan dan pemeriksaan.

(3) TNB tidak perlu mematuhi ss. 5 dan 6 ABE untuk tujuan pemeriksaannya bawah s. 38 ABE. Hak TNB bawah s. 38 ABE tidak tertakluk pada ss. 5 dan 6 ABE. Oleh itu, tidak ada masalah pencerobohan yang timbul akibat ketidakpatuhan tersebut. Terdapat dua sebab yang berkaitan dengannya. Pertama dan terpenting, ss. 5 dan 6 ABE berkenaan dengan kuasa ST untuk menyiasat pelakuan kesalahan bawah s. 37 ABE atau apa-apa Peraturan yang dibuat menurut ABE. Kuasa ST bawah ss. 5 dan 6 ABE berkenaan dengan bidang kuasa jenayahnya untuk tujuan mengenal pasti pelaku kesalahan bawah ABE. Seperti yang diperuntukkan bawah ss. 42 dan 43, ini adalah untuk tujuan tindakan jenayah. Ini adalah bidang kuasa penguatkuasaan jenayah. Sebaliknya, kuasa dan/atau hak TNB untuk memasuki premis penggunanya bawah s. 38(1) ABE (dibaca dengan peraturan 7 PBPL) adalah untuk memastikan bekalan elektrik kepada pengguna dan fungsi meter untuk memastikan penggunaan pengguna. Kuasa ini jelas berkaitan dengan hak TNB bawah tuntutan sivil atas kehilangan pendapatan kerana gangguan meter. Kuasa ST bawah ss. 5 dan 6 dan hak TNB untuk tuntutan sivil bawah s. 38 terdapat dalam bahagian lain ABE iaitu masing-masing bawah Bahagian III (Fungsi, Tugas dan Kuasa Suruhanjaya) dan Bahagian IX (Kesalahan dan Penalti). Peruntukan bawah bahagian-bahagian ESA yang berasingan ini tidak bertindih dan juga tidak secara jelas merujuk pada satu sama lain. Kuasanya terpisah dan bebas antara satu sama lain. Tidak dibenarkan untuk mengaitkan dan/atau mengguna pakainya secara bertindih. Sebab kedua mengapa mahkamah ini berpendapat bahawa hak TNB berada di bawah s. 38 ESA tidak tertakluk kepada ss. 5 dan 6 adalah berdasarkan keputusan mahkamah ini dalam *TNB v. Ichi-Ban & 5 Kes lain* ('*Ichi-Ban*') yang memutuskan, antara lain, bahawa ss. 38 dan 37 ABE bebas antara satu sama lain kerana satu merujuk pada tuntutan sivil dan yang lain merujuk kepada pendakwaan jenayah. Akibatnya, oleh sebab kedua-dua ss. 37 dan 38 ABE diperintahkan oleh mahkamah ini dalam *Ichi-Ban* agar bebas antara satu sama lain, disokong oleh pembacaan s. 38 dan sejarah perundangannya, itu gagal mencetuskan dan menarik ss. 5 dan 6 ABE yang mengatur proses dalam penguatkuasaan bidang kuasa jenayah untuk menahan TNB untuk pematuhan. Tidak masuk akal untuk

mentafsirkan s. 38 mencetuskan ss. 5 dan 6 apabila kedua-dua peruntukan tersebut dimaksudkan oleh Badan Perundangan untuk melayani tujuan yang berbeza. Ini adalah bacaan yang paling harmoni untuk tafsiran s. 38 yang diterima oleh mahkamah ini.

(4) Isu 'pada semua masa yang munasabah' berkaitan dengan definisi dan ruang lingkup peraturan 7. Ungkapan ini belum ditentukan dalam PBPL itu sendiri. Sebagai pertimbangan pertama, ABE atau PBPL tidak secara tegas atau khusus memperuntukkan apa-apa sekatan atau batasan untuk masa pemeriksaan meter dapat dilakukan oleh TNB. Bahagian frasa yang relevan dalam isu ini adalah 'pemegang lesen boleh pada bila-bila masa yang munasabah.' Dalam maksud biasa, peraturan 7 memberikan kuasa budi bicara kepada pemegang lesen untuk memasuki premis pengguna pada setiap masa yang munasabah. Konteks 'pada semua waktu yang wajar' mestilah seperti yang diperuntukkan oleh peraturan 7, iaitu 'selama berlanjutannya bekalan.' Kelopongan di sini terletak pada maksud 'semasa berlanjutan bekalan' dan 'pada semua masa yang munasabah'. Jawapannya terletak pada masa pemegang lesen secara munasabah dan praktikal mengesyaki bahawa kesalahan usikan meter berlaku. Ini kerana dua sebab (i) maksud 'semasa berlanjutan bekalan' mesti ditafsirkan tidak semestinya hanya merujuk pada waktu operasi premis pengguna. Dalam kes usikan meter, tidak melebihi jejak logik bahawa jangka masa 'semasa berlanjutan bekalan', bermula dari penemuan kesalahan tersebut. Ini pada dasarnya bermaksud, apa yang menjadi kelanjutan bekalan adalah termasuk ketika pengguna membuat gangguan terhadap meter untuk penggunaan elektrik yang lebih lama dan lebih murah. Dalam contoh ini, secara teknikal, 'lanjutan bekalan' masih berjalan dari titik penemuan itu, *fortiori* s. 38(3) membenarkan tuntutan kehilangan pendapatan dari tarikh kesalahan itu ditemui yang disahkan oleh mahkamah ini dalam kes *Ichi-Ban*. Selalunya terdapat kelanjutan bekalan elektrik, bahkan di luar waktu perniagaan atau operasi pengguna. Oleh itu, kegunaan peraturan 7 PBPL tidak boleh dihadkan atau terbatas pada waktu perniagaan atau operasi pengguna; dan (ii) kemasukan seharusnya dibuat selama tempoh di mana kesalahan gangguan meter wajar dilakukan. Oleh kerana gangguan meter adalah suatu kesalahan, tidak dapat disangkal lagi tidak logik untuk 'kesalahan' dilakukan dalam 'jam operasi' premis pengguna. Kemungkinan besar meter akan diganggu pada saat premis berhenti beroperasi pada waktu operasi mereka. Logik dan akal menentukan, gangguan meter dianggap oleh Badan Perundangan sebagai kesalahan hanya kerana sifat tugasnya berada di luar waktu operasi biasa. Untuk mengehadkan kemasukan untuk pemeriksaan hanya dalam waktu perniagaan atau operasi pengguna, akan memungkinkan gangguan meter berlaku di luar waktu perniagaan atau operasi pengguna dengan penggunaan kaedah gangguan

tidak tetap seperti pengapit logam. Inilah kesalahan yang ingin diatasi oleh Badan Perundangan dan mahkamah ini tidak perlu ragu untuk menjelaskannya. Membaca kedua-dua maksud dengan cara ini akan membawa pada pembacaan yang harmoni dan sesuai dengan niat Badan Perundangan mengenai interaksi menyeluruh antara s. 38 dan peraturan 7 terhadap aspek praktikal kes gangguan meter. Oleh itu, apa yang dimaksudkan sebagai 'pada waktu yang wajar' adalah persoalan fakta yang sangat bergantung pada fakta dan keadaan setiap kes.

(5) Persoalan mengenai anggapan yang tidak dapat dipatahkan atau boleh dipatahkan tidak timbul setakat yang berkaitan dengan s. 38(1) ABE. Ini hanyalah kesimpulan yang dapat diambil secara logik daripada fakta yang telah ditetapkan. Terdapat hubungan rasional antara penemuan pengapit logam dan inferens yang dibuat bahawa pengguna menyebabkan pengalihan untuk mengelakkan pendaftaran, pembacaan dan/atau rakaman penggunaan elektrik sepenuhnya oleh meter. Pemasangan pengapit logam di Blok Terminal Uji meter TNB menjurus pada satu kesimpulan logik bahawa meter telah diusik. Undang-undang keterangan mengakui terdapat beberapa bukti dan/atau keadaan yang membawa pada satu kesimpulan logik. Ini hanya bermaksud bahawa mahkamah diminta untuk membuat kesimpulan logik dan mengaitkan maksud dengan keterangan. Sudah menjadi pengetahuan umum bahawa TNB memasang meter untuk merekodkan penggunaan elektrik penggunanya. Pembacaan meter akan menentukan caj elektrik yang harus dibayar oleh pengguna kepada TNB. Pengapit logam ini bukan sebahagian daripada meter TNB. Tidak dapat disangkal bahawa fungsi pengapit logam adalah untuk mengelakkan dan/atau mengganggu pembacaan atau rakaman sebenar penggunaan elektrik oleh meter TNB. Penggunaan pengapit logam dimaksudkan untuk menjadi bentuk usikan yang tidak tetap pada meter TNB, kerana mudah dikeluarkan untuk mengelakkan pengesanan. Ini terbuka pada pihak pembelaan untuk mencabar kewajaran inferens. Responden bebas untuk menambahkan keterangan langsung atau keadaan semasa perbicaraan yang akan memutuskan hubungan jelas antara penggunaan elektrik dan inferens bahawa meter telah diusik dan menyebabkan pengalihan dan inferens dapat dicapai secara wajar dan logik. Menjadi kewajipan mahkamah untuk menyelesaikan konflik dalam keterangan, untuk mempertimbangkan keterangan dari segala sudut dan perspektif dan menentukan sama ada inferens itu wajar berdasarkan kesan gabungan dan kekuatan kumulatif dari semua keterangan yang dikemukakan di mahkamah.

(6) Punca tindakan sivil bawah s. 38(3) hingga (5) ABE hanya berlaku setelah penemuan TNB mengenai usikan meter semasa pemeriksaan bawah s. 38(1) ABE. Kausa tindakan yang dijangkakan bawah s. 38(3) dan (5) ABE adalah tuntutan berkanun, di mana hak untuk mendapatkan balik atau relief ditentukan secara khusus di dalamnya. Kausa tindakan

tidak bergantung pada mana-mana tuntutan undang-undang umum untuk tort atau pelanggaran kontrak. Oleh itu, apabila kausa tindakan bermula dari penemuan usikan meter, tempoh had masa bermula daripadanya dan seterusnya.

(7) Oleh kerana ABE tidak memperuntukkan metodologi yang digunakan oleh TNB untuk mengira kehilangan pendapatan yang dialaminya akibat gangguan meter, Parlimen meletakkan proses penentuan pada TNB kerana kesulitan yang wujud dalam jenis tuntutan ini. Tidak mungkin atau tidak logik untuk mengharapkan TNB memberikan pengiraan yang tepat mengenai kerugian pendapatan yang dialami. Persoalan mengenai kaedah pengiraan TNB untuk pengiraan kebelakang bayaran dan perbelanjaan bawah s. 38(4) ABE, setelah penemuan usikan meter, memberikan hak pada mahkamah untuk membenarkan jumlah penuh yang dituntut oleh TNB sebagai kehilangan hasil dan perbelanjaan, atau haruskah mahkamah membuat perintah agar ganti rugi dinilai untuk mempertimbangkan kesalahan ketara dalam pengiraan, tidak relevan dan tidak memerlukan jawapan oleh mahkamah ini. Pertanyaan tersebut mengandaikan bahawa terdapat penemuan kesalahan dalam pengiraan jumlah bayaran kebelakang apabila tiada penemuan seperti itu oleh Mahkamah Tinggi dan Mahkamah Rayuan. Oleh kerana hakim bicara atau Mahkamah Rayuan tidak membuat penemuan kesalahan dalam pengiraan bayaran kebelakang, persoalan itu harus ditolak.

(8) Dalam kes usikan meter, walaupun TNB berhak untuk secara sah menuntut tuntutan untuk pengayaan yang tidak adil, mesti terdapat pengakuan yang tepat dan spesifik dalam pernyataan tuntutan bahawa kausa tindakannya adalah berasas dan butir-butir material yang menimbulkannya mesti diberikan dalam pliding tersebut. Jelas, penggunaan pengapit logam untuk mengganggu meter adalah tindakan untuk mengaut keuntungan dari penggunaan elektrik yang lebih rendah, sehingga menyebabkan keuntungan yang salah pada pelaku dan kerugian yang salah pada TNB. Oleh itu, ini adalah bentuk pengayaan yang tidak adil. Namun, ketika mahkamah ini memeriksa pernyataan tuntutan TNB, bukan hanya ganti rugi teladan yang tidak diplid tetapi yang lebih penting lagi, fakta yang menimbulkan dan membenarkan pemberian ganti rugi teladan tidak diajukan. Walaupun tuntutan ganti rugi boleh diberikan dalam kes kontrak yang luar biasa, ini mesti diplidkan secara khusus kerana seseorang tidak boleh dihukum tanpa pemberitahuan terlebih dahulu mengenai tuduhan tersebut. Oleh itu, ganti rugi teruk atau teladan mesti diplidkan di mahkamah agar mahkamah boleh memerintahkannya sebagai relief kepada pihak yang berjaya.

(9) Tidak boleh disangkal bahawa pengguna mesti membayar elektrik yang digunanya. Setelah gangguan meter dibuktikan, mahkamah harus menentukan kehilangan pendapatan yang dialami oleh TNB dan boleh diperolehi semula daripada pengguna. Ini harus berlaku kerana prinsipnya adalah bahawa pengguna TNB mesti membayar elektrik yang digunakan dan tidak dibenarkan mendapat keuntungan daripada usikan meter untuk membuat bayaran yang berkurangan. Walaupun sekiranya dengan bukti usikan meter, tuntutan TNB akan ditolak sepenuhnya, ini akan mengakibatkan TNB menderita secara tidak wajar dan tidak adil daripada usikan yang Parlimen berniat untuk melindunginya. Remedi yang diberikan secara jelas oleh s. 38 ABE untuk melindungi kepentingan TNB daripada usikan meter akan menjadi tidak berguna. Oleh itu, jika mahkamah mendapati bahawa terdapat kesalahan ketara dalam pengiraan TNB untuk kehilangan pendapatan, perintah untuk ganti rugi dapat dibuat, tentu sahaja dengan mempertimbangkan kesalahan tersebut. Berikutan alasan-alasan ini, mahkamah ini menolak untuk menjawab persoalan yang diajukan mengenai titik Garis Panduan Suruhanjaya Tenaga kerana mereka tidak terbatas pada isu-isu undang-undang kerana ini menimbulkan juga isu-isu fakta dan keterangan.

Case(s) referred to:

Asia Pacific Higher Learning Sdn Bhd v. Majlis Perubatan Malaysia & Anor [2020] 3 CLJ 153 FC ***(refd)***

Broome v. Cassell [1971] 2 QB 354 ***(refd)***

Chang Siew Lan v. Loh Chooi Teng [2010] 1 CLJ 657 FC ***(refd)***

Dream Property Sdn Bhd v. Atlas Housing Sdn Bhd [2015] 2 CLJ 453 FC ***(refd)***

Empayar Canggih Sdn Bhd v. Ketua Pengarah Bahagian Penguatkuasa Kementerian Perdagangan Dalam Negeri Dan Hal Ehwal Pengguna Malaysia & Anor [2014] MLJU 1869 ***(refd)***

Ganga Prasad Maheshwari v. CIT [1983] 139 ITR 1043 ***(refd)***

Karya Lagenda Sdn Bhd v. Kejuruteraan Bintai Kindenko Sdn Bhd & Anor [2009] 2 CLJ 1 FC ***(refd)***

Kuan Pek Seng @ Alan Kuan v. Robert Doran & Ors And Other Appeals [2012] 1 LNS 775 HC ***(refd)***

Macon Works & Trading Sdn Bhd v. Phang Hon Chin & Anor [1975] 1 LNS 93 HC ***(refd)***

Megahock Pipes & Profile Manufacturing Sdn Bhd v. Tenaga Nasional Bhd & Another Case [2018] 1 LNS 2177 HC ***(refd)***

Melawangi Sdn Bhd v. Tiow Weng Theong [2020] 4 CLJ 1 FC ***(refd)***

Norbis v. Norbis (1986) 65 ALR 12 ***(refd)***

Pahlawan Sdn Bhd v. Tenaga Nasional Bhd (Civil Appeal No J 01(IM)-455-2100) (Unreported) ***(refd)***

Pihak Berkuasa Tatatertib Majlis Perbandaran Seberang Perai & Anor v. Muziadi Mukhtar [2020] 1 CLJ 1 FC ***(refd)***

Rehanah Mahmood v. Tenaga Nasional Bhd [2016] 1 LNS 580 HC ***(refd)***

Rookes v. Barnard [1964] AC 1129 ***(refd)***

Sumbang Projeks Sdn Bhd v. Tenaga Nasional Bhd [2014] 4 CLJ 323 CA ***(refd)***

Syed Akhbar v. State of Karnataka AIR [1979] SC 1848 ***(refd)***
Tebin Mostapa v. Hulba-Danyal Balia & Anor [2020] 7 CLJ 561 FC ***(refd)***
Tenaga Nasional Bhd lwn. Arkitek Urbanisma Sdn Bhd [2011] 10 CLJ 796 HC ***(refd)***
Tenaga Nasional Bhd v. AWP Enterprise (M) Sdn Bhd [2015] 1 CLJ 400 CA ***(refd)***
Tenaga Nasional Bhd v. Chong Ching Food Supply [2013] 1 LNS 870 HC ***(refd)***
Tenaga Nasional Bhd lwn. City Edible Ice Sdn Bhd [2016] 1 LNS 1115 HC ***(refd)***
Tenaga Nasional Bhd v. Greatpac Sdn Bhd [2016] 1 LNS 862 HC ***(refd)***
Tenaga Nasional Bhd v. Ichi-Ban Plastic (M) Sdn Bhd & Other Appeals [2018] 3 CLJ 557 FC ***(foll)***
Tenaga Nasional Bhd lwn. Oscar Canary Sdn Bhd [2016] 1 LNS 1850 HC ***(refd)***
Tenaga Nasional Bhd lwn. Sim Lai Ling [2013] 10 CLJ 809 HC ***(refd)***
Tenaga Nasional Bhd v. Ternakan Air Wui Kyee Sdn Bhd & Another Appeal [2015] 5 CLJ 955 CA ***(refd)***
Tenaga Nasional Bhd lwn. Wangsaga Industries Sdn Bhd [2018] 1 LNS 759 HC ***(refd)***
Terengganu Forest Products Sdn Bhd v. Cosco Container Lines Co Ltd & Anor And Other Applications [2011] 1 CLJ 51 FC ***(refd)***
V SP Suppiah Chettier v. KS Navaradnam [1972] 1 LNS 159 HC ***(refd)***
Whiten v. Pilot Insurance Co [2002] SCJ No 19 ***(refd)***
Zaidi Kanapiah v. ASP Khairul Fairoz Rodzuan & Ors And Other Appeals [2021] 5 CLJ 581 FC ***(refd)***

Legislation referred to:
Courts of Judicature Act 1964, s. 96
Electrical Inspectorate Act 1983 (repealed), ss. 4, 5, 6, 26, 27, 28, 29, 30, 31
Electricity Supply Act 1990, ss. 5, 6, 37(1), (3), (4), (14), 38(1), (3), (5), 39(1), 42, 43, 53(1)(s), (x)
Evidence Act 1950, s. 4(1), (2), (3)
Federal Constitution, art. 13
Interpretation Acts 1948 and 1967, s. 35
Land Code (Sarawak) (Cap 81), s. 177(1)
Licensee Supply Regulations 1990, reg. 7(a)
Limitation Act 1953, s. 6(1)(a)

Other source(s) referred to:
Bennion on Statutory Interpretation, 7th edn, Lexis Nexis, 2017, p 593
James B Thayer, *Presumptions and Law of Evidence,* vol 3(4), H. Law Rev. 141 (1889), p 154

(Civil Appeal No: 02(f)-34-05-2018(W))
For the appellant - Steven Thiru & Hadi Mukhlis; M/s Steven Thiru & Sudhar Partnership
For the respondent - Jack Yow Pit Pin & Kan Hui Ling; M/s Rahmat Lim & Partners

(Civil Appeal No: 02(f)-23-03-2020(B))
For the appellant - Jack Yow Pit Pin & Kan Hui Ling; M/s Rahmat Lim & Partners
For the respondent - Alvin John, Rubachandran Govindasamy & Alvin Sigar Acho; M/s Alvin John & Partners

(Civil Appeal Nos: 02(f)-6-02-2021(J) & 02(f)-8-02-2021(J))
For the appellants - P Mithran, Lim Yew Yi & Tan Kai Wen; M/s Kerk & Partners
For the respondent - Steven Thiru, Hadi Mukhlis Khairulmaini, Izatunlina Jamaludin & Mohd Amierul Sharafi; M/s Othman Hashim & Co

Reported by Suhainah Wahiduddin

A

JUDGMENT

Azahar Mohamed CJ (Malaya), Mohd Zawawi Salleh, Abdul Rahman Sebli, Zaleha Yusof & Rhodzariah Bujang FCJJ:

Introduction

B **[1]** The following four appeals are heard together on common issues of law in claims by Tenaga Nasional Berhad ("TNB") for loss of revenue due to meter tampering pursuant to sub-ss. 38(3) to (5) of the Electricity Supply Act 1990 ("the ESA 1990"):

C (i) Civil Appeal No. 02(f)-34-05-2018(W) (*TNB v. Evergrowth Aquaculture Sdn Bhd*);

(ii) Civil Appeal No. 02(f)-23-03-2020(B) (*Tetangga Bahagia Sdn Bhd v. TNB*);

(iii) Civil Appeal No. 02(f)-6-02-2021(J) (*Megahock Pipes & Profile* D *Manufacturing Sdn Bhd v. TNB*); and

(iv) Civil Appeal No. 02(f)-8-02-2021 (J) (*Megahock Pipes & Profile Manufacturing Sdn Bhd v. TNB*).

[2] Parties will be referred to by their respective names. As it is, the E common party to these four appeals is TNB who is the appellant in one of these appeals and respondent in the other three. Other parties, namely Evergrowth Aquaculture Sdn Bhd ("Evergrowth"), Tetangga Bahagia Sdn Bhd ("Tetangga Bahagia") and Megahock Pipes & Profile Manufacturing Sdn Bhd ("Megahock") will be referred to by their names where necessary, but F their shared commonalities grouped them to be conveniently referred to as "the consumers".

[3] There are several questions of law in these four appeals which give rise to common issues of law. It is important to reiterate at this point that in framing the common issues, all the parties agreed to adopt the approach taken G in *Tenaga Nasional Bhd v. Ichi-Ban Plastic (M) Sdn Bhd & Other Appeals* [2018] 3 CLJ 557; [2018] 3 MLJ 141; FC ("*Ichi-Ban*") and *Terengganu Forest Products Sdn Bhd v. Cosco Container Lines Co Ltd & Anor And Other Applications* [2011] 1 CLJ 51; [2011] 1 MLJ 25; FC. That is to say, the common issues of law are to be determined first and the decision on these issues are then to H be applied to the substantial merits of each appeal. Therefore, at this stage, the facts underlying the respective appeals are not particularly important in determining the common issues of law. Reference is only made to facts where context necessitates.

Common Issues Of Law

I **[4]** The questions of law in respect of which leave applications to appeal were allowed in the four appeals may be categorised and framed into the following six common issues of law:

(i) Whether TNB can rely on reg. 7 Licensee Supply Regulations 1990 ("LSR 1990") to enter consumer's premises in order to obtain a remedy under sub-s. 38(3) of the ESA 1990 without complying with the requirements under s. 5 of the ESA 1990? ("the entry and inspection point"). A

(ii) Whether TNB's discovery of a metal clamp affixed to its meter at a consumer's premises is sufficient in law for the court to hold that there was a meter tampering for the purposes of sub-s. 38(1) and 38(3) of the ESA 1990? ("the metal clamp point"). B

(iii) Whether limitation under s. 6 of the Limitation Act 1953 ("LA 1953") starts to run from the date the meter was alleged to have been tampered with or from the date the meter tampering was alleged to have been discovered? ("the limitation point"). C

(iv) Whether significant errors in TNB's calculation for loss of revenue will lead to a dismissal of TNB's claim or whether the court should substitute an alternative amount for the claim? ("the alternative remedy point"). D

(v) Whether aggravated or exemplary damages must be pleaded for the court to order it as a relief to the successful party? ("the aggravated/ exemplary damages point").

(vi) Whether in adjudicating the fairness and reasonableness of the loss of revenue claimed by the respondent, the Energy Commission's Guideline and the compliance thereof in computing the loss of revenue is an overriding consideration that excludes the consideration of other contrary evidence which may vitiate the operation thereof and the sum that may be lawfully claimed? ("the Energy Commission's Guideline point") E F

[5] We will take each in turn.

The Entry And Inspection Point

[6] This point concerns question 3 in Civil Appeal No. 02(f)-34-05-2018(W) which reads: G

> Whether the phrase "at all reasonable times" in Regulation 7 of the Licensee Supply Regulations 1990 only allows for TNB to conduct an inspection of its meter at the consumer's premises during the operational activity or business hours of the consumer? H

[7] This point also involves question 1 in Civil Appeal No. 02(f)-23-03-2020(B) which reads:

> Whether TNB can rely on Regulation 7 Licensee Supply Regulations 1990 to enter consumer's premises in order to obtain a remedy under section (*sic*) 38(3) of the ESA 1990 without complying with the requirements under section 5 ESA of the 1990? I

[8] This point also directly relates to questions 1 and 2 in Civil Appeal No. 02(f)-6-02-2021(J) which read:

(i) For the purpose of section 38 of the ESA 1990, that is to find evidence of an offence under section (*sic*) 37(1), (3) or (14) of the ESA 1990, must Respondent as a licensee comply with the requirements of section 5 and section 6 of the ESA 1990?

(ii) If the answer is in the affirmative, does it amount to a trespass by the licensee if there is no compliance?

[9] In substance, this issue revolves around TNB's power to enter a consumer's premises to determine whether its meter has been tampered for purposes of s. 38 of the ESA 1990. There are two parts to this common issue of law. Firstly, whether TNB's inspection of its meter at the consumer's premises is subject to the powers of the Energy Commission ("EC") under ss. 5 and 6 of the ESA 1990. And secondly, whether TNB's inspection of its meter at the consumer's premises pursuant to reg. 7 of the LSR 1990 can only be carried out during the business/operational hours of the consumer.

[10] The crux of this issue lies on the contention of the consumers that TNB is not permitted to illegally enter and investigate whether there is a commission of meter tampering within the premises of the consumers. The consumers argued that for the purpose of s. 38 of the ESA 1990 in regards to the finding of the "offences" under sub-s. 37(1), (3) and (4) of the ESA 1990, the inspection by TNB as the licensee must be done in compliance with ss. 5 and 6 of the ESA 1990. Further, the inspection or investigation may only be done by the EC or by TNB with the EC's coordination. This is the essence of the contention of the consumers. It is contended that TNB has to comply with reg. 7 of the LSR 1990 for entry and inspection "at any reasonable time" before finding the commission of the "offence" and this reasonable time must be within the working time operation of the consumers' premises. Consequently, for the failure to abide the abovementioned amounts to trespass of the consumers' premises by default.

[11] The pivotal position of TNB is this. Sections 5 and 6 of the ESA 1990 are in respect of the powers of the EC to investigate the commission of offences under the ESA 1990 (s. 37 of the ESA 1990) or any regulations made pursuant to the ESA 1990. This will be for the purposes of criminal action (see ss. 42 and 43 of the ESA 1990) and therefore it is a criminal enforcement jurisdiction. The criminal enforcement jurisdiction of the EC is unrelated to the civil claim jurisdiction. The point behind the argument is that the exercise of the powers of the EC under ss. 5 and 6 of the ESA 1990 are separate from the powers of TNB under sub-s. 38(1) and 38(3) of the ESA 1990, and reg. 7 of the LSR 1990. Subsections 38(1) and (3) of the ESA 1990 must be read harmoniously with reg. 7(a) of the LSR 1990. This is for the purposes of the civil claim jurisdiction. It has nothing to do with the criminal

enforcement jurisdiction of the EC. Accordingly, sub-s. 38(1) and (3) of the ESA 1990 and reg. 7 of the LSR 1990 are not subjected to ss. 5 and 6 of the ESA 1990.

[12] In our opinion, this issue involves legislative interpretation. It concerns the proper construction of s. 38 and ss. 5 and 6 of the ESA 1990, the definition and scope of the phrase "at any reasonable time" in the context of reg. 7 of the LSR 1990 and the interplay between these two provisions. The issue posed involves the consideration of two points, namely: (i) the legislative history of the ESA 1990 and (ii) the scheme of the present s. 38 of the ESA 1990.

[13] But before dealing with these key considerations, it is important to reiterate the latest decision of this court in *Tebin Mostapa v. Hulba-Danyal Balia & Anor* [2020] 7 CLJ 561; [2020] 4 MLJ 721 at 735; FC ("*Tebin*") in relation to the principles of statutory interpretation. In *Tebin* (*supra*) this court had the occasion to decide on the interpretation of the provisions relating on whether *qua* administrator had the *locus standi* to apply for the removal of the caveat under sub-s. 177(1) of the Sarawak Land Code. Vernon FCJ succinctly summarised as follows at 581 (CLJ); 734-741 (MLJ):

> [30] In our opinion, the rules governing statutory interpretation may be summarised as follows. *First, in construing a statute effect must be given to the object and intent of the Legislature in enacting the statute.* Accordingly, the duty of the court is limited to interpreting the words used by the Legislature and to give effect to the words used by it. The court will not read words into a statute unless clear reason for it is to be found in the statute itself. Therefore, in construing any statute, the court will look at the words in the statute and apply the plain and ordinary meaning of the words in the statute. *Second, if, however the words employed are not clear, then the court may adopt the purposive approach in construing the meaning of the words used. Section 17A of the Interpretation Acts 1948 and 1967 provides for a purposive approach in the interpretation of statutes.* Therefore, where the words of a statute are unambiguous, plain and clear, they must be given their natural and ordinary meaning. The statute should be construed as a whole and the words used in a section must be given their plain grammatical meaning. It is not the province of the court to add or subtract any word; the duty of the court is limited to interpreting the words used by the legislature and it has no power to fill in the gaps disclosed. Even if the words in a statute may be ambiguous, the power and duty of the court 'to travel outside them on a voyage of discovery are strictly limited'. *Third, the relevant provisions of an enactment must be read in accordance with the legislative purpose and applies especially where the literal meaning is clear and reflects the purposes of the enactment. This is done by reference to the words used in the provision; where it becomes necessary to consider every word in each section and give its widest significance*. An interpretation which would advance the object and purpose of the enactment must be the prime consideration of the court, so as to give full meaning and effect to it in the achievement to the declared

A objective. As such, in taking a purposive approach, the court is prepared to look at much extraneous materials that bears on the background against which the legislation was enacted. It follows that a statute has to be read in the correct context and that as such the court is permitted to read additional words into a statutory provision where clear reasons for doing so are to be found in the statute itself. (emphasis added)

B

[14] Against the above principles, we shall first deal with the legislative history of the relevant provisions of the ESA 1990. This will give context to our discussion. Courts will often look to the previous law to support a particular construction. Legislative history forms the backdrop and the foundation of the understanding of the impugned legislation or provision (see: *Bennion on Statutory Interpretation*, 7th edn., Lexis Nexis, 2017 at p. 593).

C

[15] The ESA 1990 is the result of a compilation, alteration and improvement of several repealed laws relating to the regulation of electrical supply in Malaysia namely the Electricity Act 1949 and the Electrical Inspectorate Act 1983 ("EIA 1983"). Both the legislations were repealed with their contents adopted, consolidated and revised in line with the Government's policy to continue the privatisation of electricity for the fiscal benefits of the country (see: *Hansard*, 21 June 1990 at 4795-4796). It is important to note that the gist of the "offence and penalty" in the ESA 1990 was derived from a part within the EIA 1983.

D

E

[16] The long title of the EIA 1983 provides that it is "an Act to provide for the control of electrical installation, plant and equipment with respect to matters relating to safety of persons and for purposes connected therewith" where for the governance of the latter, the Act provides for the provisions of "offences and penalty" under Part VIII (ss. 26-31). It is to be noted that the provisions of the offences under s. 26 of the EIA 1983 was in *pari materia* with s. 37 of the ESA 1990 that reads:

F

Part IX – Offences And Penalty

Section 37. Offences.

G

(1) Any person who tampers with or adjusts any installation or part thereof or manufactures or imports or sells any equipment so as to cause or to be likely to cause danger to human life or limb or injury to any equipment or other property commits an offence and for each such offence shall, on conviction, be liable to a fine not exceeding one million

H ringgit or to imprisonment for a term not exceeding ten years or to both.

(2) Any person who by any rash or negligent act or omission causes damage to any person or property in respect of any installation or equipment or part thereof commits an offence and shall, on conviction, be liable to a fine not exceeding one hundred thousand ringgit or to

I imprisonment for a term not exceeding five years or to both.

(3) Any person who in any manner dishonestly:

(a) abstracts electricity;

(b) consumes electricity;

(c) uses electricity;

(d) alters the index of any meter or other instrument used on or in connection with any installation of any supply authority or any licensed installation for recording the output or consumption of electricity; or

(e) prevents any such meter or instrument from duly recording the output or consumption of electricity,

commits an offence and shall, on conviction:

(A) be liable:

(i) in the case of a domestic consumer, to a fine of not less than one thousand ringgit and not exceeding fifty thousand ringgit or to imprisonment for a term not exceeding one year or to both; and

(ii) in the case of a non-domestic consumer, to a fine of not less than twenty thousand ringgit and not exceeding one million ringgit or to imprisonment for a term not exceeding five years or to both;

and

(B) be liable for the second and subsequent offence:

(i) in the case of a domestic consumer, to a fine of not less than five thousand ringgit, and not exceeding one hundred thousand ringgit or to imprisonment for a term not exceeding three years or to both; and

(ii) in the case of a non-domestic consumer, to a fine of not less than one hundred thousand ringgit and not exceeding five million ringgit or to imprisonment for a term not exceeding ten years or to both.

(4) Any person who, in contravention of section 9, uses, works or operates, or permits to be used, worked or operated any installation commits an offence and shall, on conviction, be liable to a fine not exceeding fifty thousand ringgit and to a further fine not exceeding one thousand ringgit for every day or part of a day during which the offence continues after conviction.

(5) Any person who, in contravention of section 9, supplies electricity from an installation to or for the use of any person commits an offence and shall, on conviction, be liable to a fine not exceeding one hundred thousand ringgit, and to a further fine not exceeding one thousand ringgit for every day or part of a day during which the offence continues after conviction.

(6) Any licensee who without the express authority from the Commission supplies electricity or lays down any supply line or constructs any electrical work outside the area of supply specified in his licence commits an offence and shall, on conviction, be liable to a fine not exceeding five thousand ringgit, and any such unauthorised line or work may, after conviction, be removed by order of the Commission, and if such order is not complied with, the reasonable costs of such removal may be recovered from the licensee.

(7) Any licensee who without lawful excuse fails to comply with any term or condition expressed in the licence commits an offence and shall, on conviction, be liable to a fine not exceeding ten thousand ringgit and, to a further fine not exceeding one thousand ringgit for every day or part of a day during which the offence continues after conviction.

(8) Any person who fails or neglects to register any installation under section 21 commits an offence and shall, on conviction, be liable to a fine not exceeding twenty-five thousand ringgit and a further fine not exceeding one thousand ringgit for every day or part of a day during which the offence continues after conviction.

(9) Any person who, without due authority, extinguishes or damages any public lamp or damages or defaces any post, bracket or other means of support of a public lamp commits an offence and shall, on conviction, be liable to a fine not exceeding five thousand ringgit or to imprisonment for a term not exceeding one year or to both.

(10) Any person who without lawful consent of the supply authority or the licensee, as the case may be, affixes or causes to be affixed any advertisement, bill or notice or any paper against or upon, or otherwise defaces any building, post or bracket or other equipment or the enclosure thereof used for or in connection with any public installation commits an offence and shall, on conviction, be liable to a fine not exceeding twenty five thousand ringgit.

(11) Any person who wilfully or negligently:

(a) causes electricity to be diverted from its proper course to be wasted; or

(b) breaks, throws down, causes to fall or damages any supply line, post, pole, or other equipment, installation or any part thereof, as the case may be, connected with the supply of electricity,

commits an offence and shall, on conviction, be liable to a fine not exceeding fifty thousand ringgit or to imprisonment for a term not exceeding three years or to both.

(12)(a) No person shall without the lawful authority of the supply authority or the licensee, as the case may be, undertake any work or engage in any activity in the vicinity of any electrical installation or part thereof as may be prescribed in a manner likely to interfere with any electrical installation or to cause danger to any person or property.

(b) Any person who contravenes this section commits an offence and shall, on conviction, be liable to a fine not exceeding fifty thousand ringgit or to imprisonment for a term not exceeding two years or to both.

(13) (a) No person shall install any electrical wiring or extension to existing wiring on any premises without first obtaining the approval in writing from a supply authority or licensee.

(b) Any person who contravenes this section commits an offence and shall, on conviction, be liable to a fine not exceeding ten thousand ringgit or to imprisonment for a term not exceeding two years or to both.

(14) Any person who damages or removes any meter or other instrument used on or in connection with any licensed installation for recording the output or consumption of electricity commits an offence and shall, on conviction, be liable to a fine not exceeding fifty thousand ringgit or to imprisonment for a term not exceeding two years or to both.

Any person:

(a) found guilty of any offence against this Act for which no penalty is expressly provided shall, on conviction, be liable to a fine not exceeding twenty-five thousand ringgit and, in the case of a continuing offence, to a fine not exceeding five hundred ringgit for every day or part of a day during which the offence continues after conviction;

(b) who by any act or omission contravenes any provision under this Act commits an offence and if no penalty is expressly provided shall, on conviction, be liable to a fine not exceeding fifty thousand ringgit and, in the case of a continuing offence, to a fine not exceeding five hundred ringgit for every day or part of a day during which the offence continues after conviction.

(16) For the purposes of subsection (3):

"domestic installation" means an installation in a private dwelling which is not used in any hotel or boarding house or for the purpose of carrying out any business, trade, profession or service;

"non-domestic consumer" means a consumer of electricity other than domestic consumer;

"domestic consumer" means a consumer in domestic installation supplied or connected with electricity.

[17] The provision in relation to the "Functions, Duties and Powers of Inspectorate" under Part III (ss. 4-6) of the EIA 1983 which is in essence, are the same as ss. 5 and 6 of the ESA 1990 which provide similar regulatory functions, duties and powers for the governance of the electrical installations. However, no provisions for investigation powers were provided under the EIA 1983. For ease of reference, we reproduce ss. 5 and 6 below:

A **Part III – Functions, Duties And Powers Of Commission**

Section 5. Power of entry by warrant or otherwise, inspection, examination, seizure, etc.

(1) An authorised officer may, for the purposes of discharging any of his duties or carrying out any of his functions under this Act or any regulation made thereunder, or otherwise for any of the purposes of this Act or any regulation, enter at any reasonable time upon any land, house or building with or without supply of electricity to inspect and examine any part of an installation or equipment, or for other proper cause.

(2) In every case where information is given on oath to any magistrate that there is reasonable cause for suspecting that there is in any land, house or building any article, thing, book, document, installation or part thereof used or intended to be used in relation to which any offence under this Act has been committed, he shall issue a warrant under his hand by virtue of which any authorised officer or police officer not below the rank of Inspector named or referred to in the warrant may enter the land, house or building at any reasonable time by day or night, and search for and seize or seal any such article, thing, book, document, installation or part thereof:

Provided that if an authorised officer or police officer not below the rank of Inspector is satisfied upon information received that he has reasonable grounds for believing that by reason of delay in obtaining a search warrant, any article, thing, book, document, installation or part thereof used to commit or to be used to commit an offence under this Act is likely to be removed or destroyed, he may enter such land, house or building without a warrant and seize or seal any such article, thing, book, document, installation or part thereof from therein.

(3) An authorised officer or a police officer not below the rank of Inspector making the search may seize any article, thing, book, document, installation or part thereof used or intended to be used or capable of being used for the purpose of committing an offence under this Act and if such article, thing, book, document, installation or part thereof is seized, he shall produce the same before the magistrate, and upon such production the magistrate shall direct the same to be kept in the custody of the authorised officer or the police for the purpose of any investigation or prosecution under this Act.

(4) Any authorised officer or police officer not below the rank of Inspector may in the exercise of his powers under subsection (2) or (3), if it is necessary so to do:

(a) break open any outer or inner door of the dwelling house or any other premises and enter thereinto;

(b) forcibly enter the place and every part thereof;

(c) remove by force any obstruction to entry, search, seizure and removal as he is empowered to effect; and

(d) detain every person found in the place until the place has been searched.

(5) The authorised officer or police officer not below the rank of Inspector seizing any article, thing, book, document, installation or part thereof under subsection (2) or (3) shall prepare a list of the things seized and forthwith deliver a copy signed by him to the occupier, or his agents or servants present in the premises and if the premises are unoccupied, such authorised officer or police officer shall wherever possible post a list of the things seized on the premises.

(6) An authorised officer shall at all times carry an official identification card or badge in such form as may be prescribed, and no person shall be obliged to admit to his land, house or building any person purporting to be an authorised officer except upon production of the identification card or badge.

Section 6. Powers of investigation.

(1) The Commission shall have the power to investigate the commission of any offence under this Act or any regulation made thereunder.

(2) The Commission may, in relation to any investigation in respect of any offence committed under this Act or any regulation made thereunder, exercise the special powers in relation to police investigation except that the power to arrest without warrant given by the Criminal Procedure Code [Act 593] in any seizable offence may not be exercised by the Commission.

[18] It is important to note that the closest resemblance of provision in relation to s. 38 of the ESA 1990 was s. 28 of the EIA 1983 where it provides for compensation for damages through civil claims as follows:

Section 28. Compensation for damage

(1) Any person who removes, destroys or damages whether wilfully or otherwise, any installation or any part thereof, or any public lamp or any post, bracket or other means of support of a public lamp, or any instrument used in connection with any installation for recording the output or consumption of energy, shall, in addition to any penalty to which he may be liable under this Act, be liable to pay full compensation for the damage he has done and the compensation shall be recoverable by civil action or suit before any court.

(2) Without prejudice to subsection (1), any court before which a person is charged with an offence under this Act may assess the compensation payable under this section and may make an order for the payment of the same. Any such order may be enforced as if it were a judgement in a civil action or suit.

[19] The above s. 28 of the EIA 1983 as alluded, resembles s. 38 of the ESA 1990 on the shared commonalities that they are the provisions placed under the "offence and penalty" part, whilst providing for the dealing with the compensation of claims through a civil action. But both provisions *stricto sensu* are not the same. Section 38 of the ESA 1990 was firstly introduced

by the ESA 1983 with the objective to deal with the disconnection of electrical supply in the instances of any offences committed by any consumer (see: Explanatory Statement, Item No. 40 of the Electricity Supply Blue Bill, DR241990).

[20] Section 38 of the ESA 1990 was amended twice. Once in 2001 *vide* Act A1116 and again in 2015 *vide* Act A1501. Until the 2001 amendment, the role of the EC was inexistent in s. 38 of the ESA 1990. Only that *vide* the 2001 amendment that any word referring to the "Director" was substituted to refer to the EC which was established pursuant to the enactment of the Energy Commission Act 2001, consequential to the Government's policy at that time for the centralisation of electricity supply industry governance to a specific regulatory body.

[21] It was only in 2015 that the word "Commission" appears in s. 38 of the ESA 1990 with an objective illustrated through the Explanatory Statement Item No. 31 of the Bill to the Act A1501 at 55-56 as follows:

> No. 31. Fasal 30 bertujuan untuk meminda seksyen 38 Akta 447 untuk memastikan bahawa hanya dalam kes kecurian elektrik yang jelas dan terbukti di bawah Akta sahaja yang membolehkan seorang pemegang lesen memotong bekalan kepada pengguna. Suruhanjaya juga boleh menentusahkan sama ada kesalahan itu telah dilakukan dan jika kesalahan itu tidak dilakukan, Suruhanjaya boleh mengarahkan penyambungan semula bekalan elektrik oleh pemegang lesen. Pemegang lesen juga hendaklah membuktikan bahawa mereka telah mengalami kerugian dan perbelanjaan yang munasabah sebelum pemegang lesen boleh menuntut terhadap pengguna yang berkenaan dan pemegang lesen hanya boleh mendapatkan kembali kerugian atau perbelanjaan itu melalui tindakan mahkamah dan bukan melalui pemotongan bekalan elektrik dan pemegang lesen hanya boleh menuntut bagi kerugian hasil dan perbelanjaan bagi tempoh enam bulan sahaja melainkan jika ia suatu tuntutan di mahkamah.

[22] It is imperative to set out and appreciate the present s. 38 of the ESA 1990 which *in extenso* reads as follows:

> **Part IX – Offences And Penalty**
>
> Section 38. Disconnection of supply of electricity
>
> (1) Where any person employed by a licensee finds upon any premises evidence which gives reasonable grounds for him to believe that an offence has been committed under subsection 37(1), (3) or (14), the licensee or any person duly authorised by the licensee shall within three working days from the date of such finding inform the Commission in writing, and the licensee may, upon giving not less than forty eight hours' notice from the same date in such form as may be prescribed, cause the supply of electricity to be disconnected from the said premises.

(1A) Notwithstanding any other provisions in this Act, where a police officer not below the rank of Assistant Superintendent applies to a supply authority or a licensee for the disconnection of the supply of electricity to any premises for a period not exceeding one calendar month under section 21A of the Common Gaming Houses Act 1953 [Act 289], the supply authority or the licensee or any person authorised by the supply authority or the licensee shall immediately disconnect or cause the supply of electricity to be disconnected from those premises.

(1B) Upon receiving such information under subsection (1), the Commission may verify the matter and in cases where it finds that no offence has been committed, the supply of electricity shall be reconnected immediately.

(2) If the supply of electricity has been disconnected under subsection (1), it shall not be reconnected until the licensee at his discretion gives permission for reconnection:

Provided that the period of disconnection shall not exceed three months.

(2A) Notwithstanding subsection (2), if the supply of electricity has been disconnected under subsection (1A), it shall not be reconnected without the written permission of a police officer not below the rank of Assistant Superintendent.

(3) The licensee may require the consumer to pay him for the loss of revenue due to the offence committed under subsections 37(1), (3) and (14) and any reasonable expenses directly incurred by the licensee under this section including expenses incurred in respect of reconnection of electricity in the manner as have been directed by the Commission:

Provided that and subject to subsection (4), if the licensee does not proceed with a claim for such loss of revenue and expenses in court, the licensee may only claim against the consumer for the said loss of revenue and expenses for a period not exceeding six months retrospectively from the date the offence was discovered under subsection (1).

(4) A written statement by an employee of the licensee duly certified by the licensee or any person authorised by the licensee specifying:

(a) the amount of loss of revenue or the expenses reasonable incurred by the licensee;

(aa) the manner of calculation of the loss of revenue and items of expenses; and

(b) the person liable for the payment thereof,

shall be *prima facie* evidence of the payment that has to be made by the consumer under subsection (3) and such written statement shall be notified to the consumer within fourteen working days or any period as extended with the written approval of the Commission after the disconnection.

A (5) The amount stated in the written statement under subsection (4) shall, within the period specified in the statement, be due and payable to the licensee and in default of payment such amount shall be recoverable by civil action in a court.

[23] The above legislative history suggests that the intention of Parliament B in enacting the ESA 1983 was to regulate the governance of the electricity supply industry. So much so that it incorporates the provisions in the now repealed laws, the provisions relating to the offences and penalty. It was only when the ESA 1983 Bill was tabled that s. 38 which regulates the disconnection of supply by the licensee was enacted in order to prevent C offences such as meter tampering was introduced. This is entirely clear. But when it was amended in 2015, the term "Commission" was inserted in s. 38. Here lies the poser. Does the Commission play a role within the scheme of s. 38 of the ESA 1990? If it does, is TNB therefore bound to comply with ss. 5 and 6 requirements since both provisions provide for the powers of entry and investigation respectively? Against this backdrop and primary D questions, we now turn to the second point of consideration – the scheme of s. 38 of the ESA 1990.

[24] The full provision of s. 38 of the ESA 1990 as produced above, in plain and ordinary reading, provides the overarching mechanism of E disconnection of electrical supply and the provision of remedies out of that situation. Two principles must be borne in mind. In the first place, when there is amendment to a written law was made, the law must be read from the latest amendment and shall be given effect to it. "One can only read the provision as amended. See s. 35 of the Interpretation Acts 1948 and 1967 F (Act 388) which provides, *inter alia*, that a reference to a particular written law (a) is a reference to that law as amended or extended from time to time" (see: *Zaidi Kanapiah v. ASP Khairul Fairoz Rodzuan & Ors And Other Appeals* [2021] 5 CLJ 581; [2021] 3 MLJ 759; FC, Zaleha FCJ's supporting judgment paras [174-175] at 653 (CLJ); [211]-[212] at 829-830 (MLJ)). Therefore s. 38 must be read in its present form in its latest amendment. To reiterate G *Tebin* (*supra*), if the word of the latest amendment provision is clear, then the court has the duty to expound its clear language, unless ambiguity arises, resort must be taken to the purposive approach.

[25] Secondly, a provision must be read in its entirety and its provision must not be read independently so as to construe the wholesome meaning of H the said provision. Section 38 must then be read as a whole to ascertain the real meaning of the provision as intended by the Legislature (see: *Tebin* (*supra*) and *Asia Pacific Higher Learning Sdn Bhd v. Majlis Perubatan Malaysia & Anor* [2020] 3 CLJ 153; [2020] 2 MLJ 1; FC).

I **[26]** Under the scheme of the provisions of s. 38, an important point to note is that the licensee such as the TNB, or by anyone it employed, once they enter, inspect and make finding of any evidence of the consumer committing any offence under s. 37(1), (3) and (4) shall inform the EC within a prescribed

time to cause the disconnection of the electrical supply in the consumer's premise. The disconnection may also be caused by the application of police to the supply authority. Once the licensee obtained its finding, it shall be submitted to the EC for verification. The EC's verification shall determine the disconnection or reconnection of the electrical supply. Out of that finding of offence which may be verified by the EC, the licensee may claim for the loss of revenue from the consumer with the exception that if the licensee does not proceed with a claim for such loss of revenue and expenses in court, the licensee may only claim against the consumer for the said loss of revenue and expenses for a period not exceeding six months retrospectively from the date the offence was discovered. The provision does not expressly or specifically provide for any conditions or procedure that must be complied by the licensee in making an entry and inspection. Therefore, it raises the crucial question whether the licensee is subject to the instruction and/or authorisation of the EC before making such findings and therefore caught by ss. 5 and 6 of the ESA 1990.

[27] We take the view that TNB is not required to comply with ss. 5 and 6 of the ESA 1990 for purposes of its inspection under s. 38 of the ESA 1990. TNB's right under s. 38 of the ESA 1990 is not subject to ss. 5 and 6 of the ESA 1990. As such, no issue of trespass arises from the said non-compliance. There are two connected reasons for this.

[28] First and foremost, in our opinion, ss. 5 and 6 of the ESA 1990 are in respect of the powers of the EC to investigate the commission of offences under s. 37 of the ESA 1990 or any Regulations made pursuant to the ESA 1990. The EC's powers under ss. 5 and 6 of the ESA 1990 are in respect of its criminal jurisdiction for purposes of identifying the perpetrator of the offences under the ESA 1990. As provided under ss. 42 and 43, this will be for the purposes of criminal action. It is a criminal enforcement jurisdiction. Quite the opposite, TNB's power and/or right to enter its consumers' premises under sub-s. 38(1) of the ESA 1990 (read with reg. 7 of the LSR 1990) are in respect of ensuring the supply of electricity to the consumers and the functionality of meter to ascertain the consumer's consumption. This power is clearly in respect of TNB's right under a civil claim for loss of revenue due to meter tampering. It is noteworthy that the EC's powers under ss. 5 and 6 and the TNB's right to a civil claim under s. 38 is found under different parts of the ESA 1990 ie, under Part Ill (Functions, Duties and Powers of Commission) and Part IX (Offences and Penalty) respectively. In our opinion, the provisions under these separate parts of the ESA 1990 do not overlap nor do they expressly refer to one another. The powers therein are separate and independent of one another. It is impermissible to relate and/or apply them in an overlapping manner.

[29] The second reason why we take the view that TNB's right under s. 38 of the ESA 1990 is not subject to ss. 5 and 6 is on the basis of the decision of this court in *Ichi-ban* (*supra*) where it was decided *inter alia* that ss. 38 and 37 of the ESA 1990 are independent of each other in that one refers to the civil claims and the other refers to criminal prosecution. This court held at 155-156 and we quote:

> [29] *It must be noted that ss. 37 and 38 are two distinct sections.* Section 37 is a penal provision which makes it an offence for any person who commits any act referred to in that section, for which, if found guilty he may be punished with imprisonment or fine or both. *Section 38 is a provision which enables TNB to recover its loss of revenue expeditiously without having to wait for the consumer to be prosecuted and convicted.*
>
> [30] To construe s. 38(3) as contended by the consumer would lead to an absurdity. First, the power to prosecute for an offence under s. 37(1), (3) or (14) of the Act is vested with the public prosecutor and not with TNB. Section 42 of the Act states: No prosecution shall be instituted for an offence under this Act or any regulations made under this Act except by or with the consent in writing of the Public Prosecutor. *There is no guarantee that every prosecution would result in a conviction. In the meantime, TNB's right to recover the loss of revenue would be kept in abeyance.*
>
> [31] Secondly, TNB would not be able to recover the loss of revenue if the consumer is not prosecuted and convicted, or if the prosecution results in an acquittal, notwithstanding the fact that the consumer has benefitted from the consumption of electricity. *To put it crudely, the consumer, if acquitted would enjoy free supply of electricity at the great expense of TNB. That was certainly not the intention of the Legislature.*
>
> [32] TNB's statutory right to recover its loss of revenue under s. 38(3) of the Act is not dependent on the consumer's conviction of an offence under s. 37(1), (3) or (14) of the Act. *The question of disconnecting the supply of electricity under s. 38(1) of the Act did not arise when there was no prior consumption of electricity or where in the opinion of the person employed by TNB*, no offence was committed under s. 37(1), (3) or (14) of the Act.
>
> (emphasis added)

[30] We have no reason not to disagree with *Ichi-ban* (*supra*) on this point. Consequently, as both ss. 37 and 38 of the ESA 1990 were ruled by this court in *Ichi-ban* (*supra*) to be independent of each other, supported by the wholesome reading of s. 38 and its legislative history discussed earlier, in our opinion, it failed to trigger and to attract ss. 5 and 6 of the ESA 1990 which govern the process in criminal jurisdiction enforcement to hold TNB for compliance. It is absurd to interpret s. 38 to trigger ss. 5 and 6 when both the provisions are intended by the Legislature to serve different purposes. This is the most harmonious reading for the interpretation of s. 38 which this court would adopt.

[31] There are two important points to make about all of this. First, TNB's powers under sub-s. 38(1) of the ESA 1990 (read with reg. 7 of the LSR 1990) are not subject to the EC's powers under ss. 5 and 6 of the ESA 1990. This power is distinctly in respect of TNB's right under a civil claim for loss of revenue due to meter tampering. Second, ss. 5 and 6 are relevant for the purpose of criminal investigation and prosecution undertaken by the EC.

[32] Finally, there remains to be considered is the question whether TNB's inspection of its meter at the consumer's premises pursuant to reg. 7 of the LSR 1990 can only be carried out during the business/operational hours of the consumers. A convenient starting point to deal with this issue is by setting out reg. 7 of the LSR 1990 as follows:

> **Entry during continuance of supply**
>
> 7. Any officer authorised by a licensee may at all reasonable times on the production of any duly authenticated document showing his authority, enter any premises to which a supply of electricity is being given by the licensee, or by another licensee (wholly or partly) through the first mentioned licensee's supply lines and electrical equipment, for any of the following purposes, namely:
>
> (a) inspecting any supply line or electrical equipment belonging to the licensee;
>
> (b) ascertaining the register of any electricity meter; or
>
> (c) removing inspecting or re-installing any electricity meter or installing any substitute meter.

[33] It is the contention of TNB that it is empowered under reg. 7 of the LSR 1990 and sub-s. 38(1) of the ESA 1990 to carry out inspection of its meter at the consumers' premises. It is further contended that what is "at all reasonable times" is fact sensitive and that the phrase would cover whenever there is supply of electricity to the consumer's premises, which would in turn require TNB's meter to function.

[34] The consumers contend the following:

(i) The establishment of the EC and its authorised officers as an independent party and as the arbiter of the relationship between the licensee and the consumer is tasked with the roles of investigation, seizure and gathering of evidence concerning an offence in the ESA 1990. There is no reason to read words into s. 38 reg. 7 so as to enable or justify TNB's entry into the consumers' premises to gather and seize evidence in order to enforce its rights under s. 38. Construing that TNB based on reg. 7 to convey independent powers for entry and inspection runs to the contrary of the purpose of privatisation, decentralisation,

A regulation of electricity supply including a duplication of powers which would complicate the investigation and prosecution work. It would thereby result to mishandling or distortion of the crime scene and evidence (the compliance issue);

B (ii) Nothing in the ESA 1990 as the parent Act that gave powers for the regulation of offences under the Act by the LSR 1990, a subsidiary legislation. Allowing reg. 7 to warrant the entry and inspection of the licensee amounts to *ultra vires* (the *ultra vires* issue);

C (iii) The broad word "at any reasonable time" under reg. 7 must be interpreted narrowly as to mean an entry and inspection during continuance of supply which during the standard operation time of the consumers' premises (the "at reasonable time" issue);

D (iv) The wide interpretation "at any reasonable time" renders wide powers to the licensee and this results to arbitrariness and breach of constitutional right under art. 13 of the Federal Constitution, the right to property (the powers and arbitrariness issue).

[35] On the compliance issue, in our view, it is non-issue following the reasons extrapolated in our earlier discussion that s. 38 of the ESA 1990 is independent from s. 37 by having its own different purpose which therefore E failed to trigger ss. 5 and 6 of the ESA 1990 into its own scheme. To this effect, the issue of going against the purpose of privatisation, decentralisation is therefore irrelevant.

[36] As to the *ultra vires* issue, indeed, the general rule is, a subsidiary legislation shall not contradict its parent Act (see: *Pihak Berkuasa Tatatertib* F *Majlis Perbandaran Seberang Perai & Anor v. Muziadi Mukhtar* [2020] 1 CLJ 1; [2020] 1 MLJ 141; FC ("*Muziadi*")). One pertinent point worth noting in *Muziadi* (*supra*) is the important principle that to declare a subsidiary legislation *ultra vires*, a state of contradiction must arise. The prerequisite is that there must be a conflict for a regulation to be said as being contradicting G a parent Act. Hence, it is important to determine whether there is a conflict between particular provision under the ESA 1990 and the LSR 1990. The consumers argued that reg. 7 is *ultra vires* s. 53 of the ESA 1990 on the basis that the latter section does not empower the Executive to make subsidiary regulations dealing with search and seizure or investigation of offences under H the ESA 1990. Upon perusal, s. 53 does not contain any specific provisions relating particularly to the power to make regulations dealing with search and seizure or investigation of offences, instead it laid down general powers of the Minister to make any regulation to the prescribed matters. In this instance, paras. 53(1)(s) and (x) clearly provide for the Minister the power to make regulations pertaining to entry an inspection as follows:

I

Part XI

Power To Make The Regulations

Section 53(1) The Minister may make regulations in respect of any matter which may be prescribed under this Act and in particular:

(s) **the provisions for the licensees with respect to matters pertaining to**:

(i) **the inspection of any installation or part thereof;**

(ii) the erection and fixing of public lamps;

(iii) **the disconnection of supplying of electricity; and**

(iv) **any other matter connected therewith;**

(t) …

(u) …

(v) ...

(w) …

(x) **the regulation of the licensee and consumer relationship such as provisions on the** recovery of charges for electricity supply including any surcharges for late payment, the annual interest payable by a licensee to any person or any security given and any rates or conditions connected thereto, connection, disconnection or restoration of supply by the licensee, **entry into any premises by the licensee or his authorised officers for purposes related to the supply, connection, disconnection** or restoration of supply, entry for purposes of replacing, repairing or altering any electricity line or electrical plant or equipment and the form of any notice required. (emphasis added)

[37] It is plain that the Minister has the power to enact regulations in relation to the entry and inspection of the consumers' premises. The clear phrases of "inspection of any installation or any part thereof" and "the disconnection of supplying electricity;" under para. (1)(s) is clear without ambiguity. This provision enables what reg. 7 envisaged – an entry during continuance of supply for the purpose of "(a) inspecting any supply line or electrical equipment belonging to the licensee". This is further fortified by the wider phrase of "any other matter connected therewith" to include any matter related to the matter specified. Moreover, under para. (x), the phrase "entry into any premises by the licensee or his authorised officers for purposes related to the supply, connection, disconnection" makes it even clearer as to allow the licensee such as TNB to enter the consumers' premises for the specified latter purposes.

[38] The "at all reasonable time" issue concerns with the definition and scope of reg. 7. This phrase has not been defined in the LSR 1990 itself. In the first place, the ESA 1990 or the LSR 1990 does not expressly or specifically provide for any restriction or limitation as to when the inspection of meters may be conducted by TNB. In our opinion, following *Tebin* (*supra*) on the interpretation, the plain and ordinary reading presupposes as such. The relevant portion of the phrase in this issue is "the licensee may at any reasonable time". In plain and ordinary meaning, reg. 7 confers the discretionary powers to the licensee to enter the consumers' premises at all reasonable time. What constitutes to be "reasonable" is contingent upon the facts of the case as the exact point of time is fact-sensitive having regard to all the circumstances of the particular case. In *V SP Suppiah Chettier v. KS Navaradnam* [1972] 1 LNS 159; [1972] 2 MLJ 60; FC (ACJ) at 61 it was held as follows:

> What is a "reasonable time" is not always an easy thing to determine:
>
> > *What is a reasonable time must be decided not by any resort to a judicial discretion, but having regard to all the circumstances of the particular case, and it becomes a matter of law as to what circumstances would justify the judge in coming to the conclusion that the time is reasonable.* (See *Scott v. Scott* [1921] P 107 at p 124). (emphasis added)

[39] In *Macon Works & Trading Sdn Bhd v. Phang Hon Chin & Anor* [1975] 1 LNS 93; [1976] 2 MLJ 177; HC at 182 per Hashim Yeop Sani J held that:

> The question of **what is reasonable time is a question of fact and depends in each case on the circumstances** which actually exist and on the nature of the business. (emphasis added)

[40] Further, Ahmad Maarop FCJ (as His Lordship then was) held in *Empayar Canggih Sdn Bhd v. Ketua Pengarah Bahagian Penguatkuasa Kementerian Perdagangan Dalam Negeri Dan Hal Ehwal Pengguna Malaysia & Anor* [2014] MLJU 1869; FC that:

> [20] Thus under section (*sic*) s. 38(1), a search warrant is issued if a Magistrate is satisfied that "there is reasonable cause to believe that an offence under the Act is being or has been committed in any premises". If a search warrant is issued by the Magistrate, the Assistant Controller named in the warrant is **authorised to enter the premises at any reasonable time by day or night.** (emphasis added)

[41] In our opinion, the context of "at all reasonable time" must be as what the heading of reg. 7 provides, which is "during the continuance of supply". The poser here lies as to the meaning of "during continuance of supply" and "at all reasonable time". To our mind, the answer rests in the time when the licensee reasonably and practically suspects that the offence of meter tampering ought to occur. This is for two reasons.

[42] First, the meaning of "during continuance of supply" must be interpreted to not necessarily mean only to refer to the operational hours of the consumer's premise. In a meter tampering case, it is not beyond the trail of logic that the duration of "continuance of supply", may begin from the discovery of the offence. This essentially means, what constitute a continuance of supply is inclusive of when the consumers tampered the meter for a longer and cheaper use of electricity. In this instance, technically, the "continuance of supply" still runs from that point of discovery, a *fortiori* that sub-s. 38(3) allows for claim for loss of revenue from the date the offence was discovered which was affirmed by this court in *Ichi-ban* (*supra*). There is always a continuance of supply of electricity, even outside the business or operational hours of the consumer. The utility of reg. 7 of the LSR 1990 cannot therefore be limited or restricted to the business or operational hours of the consumer.

[43] And secondly, the entry ought to have been made during the duration where the offence of meter tampering reasonably ought to be committed. As the meter tampering is an offence, it is indisputably illogical for an "offence" to be committed within the "operational hours" of the consumers' premises. Not to our mind that it cannot happen during the working operation hours, but it would be highly more probable for a meter to be tampered at the time when premises cease to operate at their operational time. Logic and common-sense dictates, a meter tampering is considered by the Legislature as an offence only because the nature of its commission is out of the normal operational hours. To limit entry for inspection to the business or operational hours of the consumer, would allow for meter tampering outside the business or operational hours of the consumer with the use of non-permanent methods of tampering such the metal clamp. In our view, this is the mischief that the Legislature intended to overcome and this court should not hesitate to expound so. Reading both of the meanings in this manner will allow harmonious reading and conforms to the Legislature's intention on the overarching interplay between s. 38 and reg. 7 to the practical aspect of a meter tampering case.

[44] As to the wide powers and the arbitrariness issue, it is founded on the complaint of the wide discretion of the licensee which may consequently results to the breach of art. 13 of the Federal Constitution. Beginning from the analysis aforementioned, that since ss. 37 and 38 are two different provisions, and s. 38 is not caught by ss. 5 and 6, trespass and breach of art. 13 is therefore non-issue as there is no provision to be complied and adhered to by the licensee. In any event, it does not mean the licensee is freed of any legal compliance. Indeed reg. 7 itself provides the requirements for the licensee to produce an authoritative document to justify its entry for the purpose pursued under s. 38 of the ESA 1990.

[45] For all the above reasons, we answer the following specific question of laws in each appeal as follows:

(i) Question 1, Civil Appeal No. 02(f)-23-03-2020(B): In the affirmative.

(ii) Question 3, Civil Appeal No. 02(f)-34-05-2018(W): In the negative. What constitute "at all reasonable time" is a question of fact which will very much depend on the fact and circumstances of each case.

(iii) Question 1 in Civil Appeal No. 02(f)-6-02-2021(J): In the negative. In respect of question 2, following the answer in question 1, there is no necessity to answer question 2.

The Metal Clamp Point

[46] This point concerns question 1 in Civil Appeal No. 02(f)-34-05-2018(W) and question 4 in Civil Appeal No. 02(f)-23-03-2020(B) which read:

> Whether TNB's discovery of a metal clamp affixed to its meter at a customer's premises is sufficient to hold that there was meter tampering for the purposes of subsections 38(1) and 38(3) ESA 1990.

[47] To provide context to the question of law under discussion, it is necessary to narrate briefly the relevant facts on the discovery of metal clamps in both cases.

[48] In Civil Appeal No. 02(f)-34-05-2018(W), the evidence adduced at the trial revealed that on 26 August 2010, at about 5am, a TNB inspection team carried out an inspection at the Evergrowth's premises. During the inspection, the TNB team alleged that one of the respondent's workers (identified as Suk Bahadur) was attempting to remove a clamp from the test terminal block of the meter. The TNB team managed to stop the worker from removing the metal clamp. Upon inspection of the meter, the team discovered that the clamp had disabled the meter from recording the actual electricity consumption at the Evergrowth's premises. In other words, the meter had been tampered with. The metal clamp was seized and a police report was lodged. The clamp was produced at trial and marked as exh. P1.

[49] In Civil Appeal No. 02(f)-23-03-2020(B), on 26 August 2010, at about 4am, the TNB team had carried out an inspection of electricity panel at the Tetangga Bahagia's premises. They found that the meter had been tampered with as they noticed that there was a metal clamp affixed to the meter panel.

[50] In both cases, TNB filed claims against the consumers for loss of revenues and expenses due to meter tampering.

[51] As a preliminary matter, learned counsel for Evergrowth argued that question no. 1 need not to be answered as it is a question of fact. According to learned counsel, whether there was a meter tampering is a question of fact. Learned counsel posited that the question posed is an attempt to reverse the findings of fact of the Court of Appeal by seeking a review of those findings by the Federal Court. This is impermissible as it is *res judicata* (citing *Chang Siew Lan v. Loh Chooi Teng* [2010] 1 CLJ 657; [2009] 6 MLJ 776; FC and *Karya Lagenda Sdn Bhd v. Kejuruteraan Bintai Kindenko Sdn Bhd & Anor* [2009] 2 CLJ 1; [2008] 6 MLJ 636; FC).

[52] With respect, we disagree. Question no. 1 deals with the liability aspect of TNB's claim, *viz*, whether the use of a metal clamp is sufficient for TNB to find that the meter had been tampered with. There is concrete legal dispute on the true and proper construction of sub-ss. 38(1) and (3) of the ESA 1990. TNB advanced the argument that our courts have found that the finding of metal clamp is sufficient to establish meter tampering for the purpose of sub-s. 38(1) and (3) of the ESA 1990. On the contrary, learned counsel for the respondents submitted that the mere production of a clamp in court cannot be sufficient in law for court to hold there was meter tampering since neither the ESA 1990 nor any other legislation has provided for such an "irrebuttable presumption". Thus, no legal provision can be relied upon by TNB to say that the production of a clamp is final and conclusive proof that meter tampering had occurred.

[53] In our view, question no. 1 is a live question of law underlying these appeals and will have practical effects on the rights of the parties. We are satisfied that the question falls within s. 96 of the Courts of Judicature Act 1964. The question is of general public importance for which further argument is required and it is in the public interest for this court to address it in order to settle the state of law. Further, a question would be a question of law if it directly or indirectly affects the rights of parties and/or there is some doubt or difference of the opinion on the same issue. Therefore, the question has not become academic.

[54] The nub of TNB's submission is that the Court of Appeal erred in reversing the findings of the High Court that the meter had been tampered with. According to learned counsel, the issue had been authoritatively determined in *Ichi-Ban* (*supra*) where this court held that the finding of meter tampering under sub-s. 38(1) of the ESA 1990 (and for a claim under sub-s. 38(3)) is based on the "subjective finding" of TNB's employee. Therefore, if TNB is able to prove the inspection it carried out resulted in the discovery of the meter clamp, the meter tampering element in both sub-s. 38(1) and sub-s. 38(3) of the ESA 1990 claim, is successfully established.

[55] This principle has been steadily applied in many cases and it has been embedded in our legal literature (citing *Tenaga Nasional Bhd v. Wangsaga Industries Sdn Bhd* [2018] 1 LNS 759; [2018] MLJU 717; HC, *Tenaga Nasional Bhd v. Greatpac Sdn Bhd* [2016] 1 LNS 862; [2016] MLJU 384; HC, *Tenaga Nasional Bhd v. Chong Ching Food Supply* [2013] 1 LNS 870; HC and *TNB lwn. Sim Lai Ling* [2013] 10 CLJ 809; HC). Learned counsel argued that it would be absurd to simply ignore the finding of such a foreign and intrusive object such as a metal clamp on TNB's meter. It is obvious that the purpose of affixing of a metal clamp on TNB's meter is to distort the meter's reading and recording unless there is a reasonable explanation given by the consumers. Learned counsel emphasised that there is no requirement for:

(i) TNB to appear before a Magistrate and/or apply for a search warrant to search and seize from the Magistrate for the purpose of an inspection under sub-s. 38(1) of the ESA 1990 and reg. 7 of the LSR 1990;

(ii) TNB is to be accompanied by the officer of the EC at the inspection; and

(iii) the metal clamp that was seized to be produced before a Magistrate or kept by the EC.

[56] Further, TNB's finding of meter tampering under sub-ss. 38(1) and (3) of the ESA 1990 is not subject to validation and approval by the EC. It is based purely on TNB's "subjective finding". In these premises, TNB urged this court to answer question no. 1 in the affirmative.

[57] At the forefront of the arguments advanced by learned counsel for the consumers is that a proof of an offence under sub-s. 37(1), (3) or (4) of the ESA 1990 is required for a claim under sub-s. 38(3) of the same Act. For TNB to prove a commission of an offence, it must show that:

(i) there is an investigation by an authorised officer of the EC as TNB, being a mere licensee under the ESA 1990, is not authorised to investigate offences under s. 6 of the ESA 1990; and

(ii) the requirements of s. 5 of the ESA 1990 have been complied with, in the sense that in investigation of an offence under sub-s. 37(1), (3) or (4) of the ESA 1990, an authorised officer from the EC should be included in the inspection team to provide for independent verification of the meter tampering. The commission of an offence cannot be proved by the opinion of a TNB's employee. The opinion of a TNB's employee is only relevant in deciding whether to disconnect electricity under sub-s. 38(1) of the ESA 1990.

[58] Learned counsel argued that Parliament did not provide for a "irrebuttable presumptions" in favour of TNB that an alleged discovery of a clamp is by itself sufficient in law to hold that the meter had been tampered with. Whether there was indeed meter tampering has to be determined from

the totality of evidence and not on the opinion of a TNB's employee. Further, sub-s. 38(1) of the ESA 1990 only confers on TNB a right to disconnect electricity from the premises of its customers. The issue of disconnection of electricity does not arise in these appeals. Learned counsel posited that only in a civil claim under sub-ss. 38(3) to (5) of the ESA 1990 would there be an opportunity for the court to make a finding of meter tampering under sub-s. 37(1), or (14) of the ESA 1990.

[59] Reference to the relevant particular provisions of the ESA 1990 is imperative. At the risk of repetition, sub-ss. 38(1) and (3) of the ESA 1990 provide as follows:

> (1) *Where any person employed by a licensee finds upon any premises evidence which gives reasonable grounds for him to believe that an offence has been committed under subsection 37(1), (3) or (14)*, the licensee or any person duly authorised by the licensee shall within three working days from the date of such finding inform the Commission in writing, and the licensee may, upon giving not less than forty eight hours' notice from the same date in such form as may be prescribed, cause the supply of electricity to be disconnected from the said premises.
>
> …
>
> …
>
> (3) *The licensee may require the consumer to pay him for the loss of revenue due to the offence committed under subsections 37(1), (3) and (14) and any reasonable expenses directly incurred by the licensee under this section* including expenses incurred in respect of reconnection of electricity in the manner as have been directed by the Commission. (emphasis added)

[60] In our view, the resolution of the question turns on the interpretation of sub-ss. 38(1) and (3) of the ESA 1990. If regard had to be given to the phrase "where any person employed by a licensee finds upon any premises evidence which gives reasonable grounds for him to believe that an offence has been committed under sub-s. 37(1), (3) or (14)" appearing in sub-s. 38(1) of the ESA 1990, it is clear that whether an offence has been committed under these subsections is based on TNB's employee "subjective finding". "Grounds to believe" is a common feature in criminal and civil statutes. It is made of two words "grounds" and "to believe". The word "grounds" means to accept as true or to have faith in it. Before TNB's employee has faith or accepts a fact to exist there must be a justification for it. The belief may not be open to scrutiny as it is final conclusion arrived at by TNB's employee concerned as result of mental exercise made by him or her as the result of an inspection carried out at the consumer's premises.

[61] However, we take the stand that the reason due to which the conclusion and/or decision is reached can always be examined. When we said that the "grounds to believe" is not open to scrutiny by the court what we meant is that the finding and/or satisfaction arrived at by the employee concerned is immune from challenge but where the finding and/or conclusion is not based on any material or it cannot withstand the test of reason, which is an integral part of it, then it falls through and the court is empowered to reject such finding and/or satisfaction. Belief may be subjective but grounds are objective (see: *Ganga Prasad Maheshwari v. CIT* [1983] 139 ITR 1043; [1981] 21 CTR 83 (AID)). In other words, the "grounds to believe" must be good in faith and must have a rational connection or relevant bearing to the formation of the belief. Belief must not be based on suspicions, speculation, surmise, conjecture, supposition or guesswork. Therefore, the existence of evidence is necessary.

[62] As we have stated earlier, we are fully in agreement and endorse the decision in *Ichi-Ban* (*supra*) where this court held that the person who decides whether an offence has been committed under sub-ss. 38(1) and (3) of the ESA 1990 is the person "employed by a licensee (TNB)". And the finding whether an offence has been committed is based on the "subjective finding" of the TNB's employee (see: para [27] of the judgment).

[63] On a bare reading of sub-s. 38(1) of the ESA 1990, it is apparent that the subsection did not say that in order to form "subjective finding" it is necessary for TNB's employees to identify the perpetrator/s of the meter tampering to succeed in its claim under sub-ss. 38(3) and (5) of the ESA 1990. The focus is therefore, is not who may have tampered with the meter but rather that due to such tampering the consumers would consume more electricity for less charges which TNB is entitled to recover.

[64] Further, if regard is to be given to the term "committed" appearing in sub-s. 38(1) of the ESA 1990, it is a clear indication that a prior conviction of the customer under sub-s. 37(1), (3) or (14) is not required before TNB proceeds with a claim under sub-s. 38(3). Clearly, the "subjective finding" of TNB's employee that an offence under sub-s. 37(1), (3) or (14) has been committed is for the purpose of civil claim under sub-s. 38(3) and not for the purpose of prosecution. A prosecution of an offence under sub-s. 37(1), (3) or (14) could only take place through the medium of a criminal prosecution in a criminal court having jurisdiction of the offences.

[65] In this regard, we agree and do adopt the reasoning in *Ichi-Ban* (*supra*) that there is no reasonable basis whatsoever that there must first be conviction of an offence under sub-s. 37(1), (3) or (14) of the ESA 1990 before TNB can pursue its claim under sub-s. 38(3) for loss of revenue. The court reasoned that a customer may commit the offence under sub-s. 38(1),

(3) or (14) of the ESA 1990 but he is not yet convicted until found guilty by the court. In the court's opinion, sub-s. 38(3) of the ESA 1990 is drafted in plain language and the cardinal rule of interpretation as *Tebin* (*supra*) proposed, is that when the language used in a statute is clear, the effect must be given to it.

[66] As indicated earlier, we have no doubt that ss. 37 and 38 of the ESA 1990 are two distinct sections. Section 37 is penal provision which makes it an offence for any person who commits any act referred to in that section, for which, if found guilty he may be punished with imprisonment or fine or both. It is important to reiterate that s. 38 is a provision which enables TNB to recover its loss of revenue expeditiously without having to wait for the customer to be prosecuted and convicted. As stated in *Ichi-Ban* (*supra*), to construe sub-s. 38(3) as requiring a conviction as precondition would lead to an absurdity as prosecuting is a power vested in the Public Prosecutor, not TNB. There is also no guarantee that the prosecution would secure a conviction. If it results in an acquittal, the consumers having benefited from the electricity consumption would be unjustly enriched at the expense of TNB. Thus, that cannot be the intention of the Legislature.

[67] With respect, we are unable to accept learned counsel for the consumers' submission that if we were to accept the proposition of law that if the finding of the clamp is by itself sufficient to hold there was indeed meter tampering, the law must provide for such "irrebuttable presumption". There is an important distinction between an inference and a presumption. Put simply, an inference is a deduction of fact that may logically and reasonably be drawn from another fact or group of fact found or otherwise established in the trial. In other words, an inference is a rational conclusion that a judge may draw from the proof of certain fact/facts if such fact/facts would lead to a reasonable person to reach the same conclusion. To have evidentiary value, the inference must be considered reasonable, meaning, it must be more than a surmise or a conjecture, and must be based on probabilities, not possibilities. For example, suppose a person is exiting a retail store and an exit alarm ring. The person is stopped by the security guard and it is discovered that he has an item in his purse that is the same type of thing the store sells and it has a security tag on it that has been deactivated by a cash register scanner. It is permissible, by common sense inference, that the person shoplifted the item, unless there may be other explanation for the event, not the least of which is that the person bought the item legitimately somewhere else and the cashier did not scan it properly.

[68] A presumption as defined by Thayer is "a rule of law that court and judges shall draw a particular inference from a particular fact or from a particular piece of evidence unless and until the truth of such inference is

A disproved" (see: James B. Thayer, *Presumptions and Law of Evidence*, vol. 3(4) H. Law Rev. 141 (1889), at 154). According to Sarkaria J in *Syed Akhbar v. State of Karnataka* AIR [1979] SC 1848; 1853, presumptions are of three types:

(i) Permissive presumptions or presumptions of fact, (sub-s. 4(1) of the B Evidence Act 1950 ("EA 1950"));

(ii) Compelling presumptions or presumptions of law (rebuttable) (sub-s. 4(2) of the EA 1950); and

(iii) Irrebuttable presumption of law or "conclusive proof" (sub-s. 4(3) of the C EA 1950).

[69] Generally speaking, presumption of facts are those inferences which are naturally and logically derived on the basis of experience and observations in the course of nature or the constitution of the human mind or springs out of human actions. These presumptions are in general D rebuttable presumptions. Presumptions of law are those inferences which are said to be established by law. It can be subdivided into rebuttable presumptions of law and irrebuttable presumptions of law. Rebuttable presumptions of law are those presumptions of law which hold good until they are disapproved by evidence to the contrary. Irrebuttable presumptions E of law are those presumptions of law which are held to conclusive in nature. They cannot be overturned by any sort of contrary evidence however strong it is.

[70] In our view, the question of irrebuttable or rebuttable presumptions does not arise insofar as sub-s. 38(1) of the ESA 1990 is concerned. This is F simply an inference that can be logically drawn from established fact. There is a rational relationship between the discovery of metal clamp and the inference to make that the customer caused the diversion to prevent full registration, reading and/or recording of electricity consumption by the meter. The fixing of a metal clamp at the test terminal block of TNB's meter G leads to one logical conclusion that the meter had been tampered with. The law of evidence recognises an abundance of inculpatory evidence and/or circumstances that leads to a single logical conclusion. It simply meant that the court is required to make logical inference and to attribute meaning to the evidence.

H **[71]** We accept the submission of learned counsel for TNB that it is common knowledge that TNB installs a meter to record the electricity consumption of its consumers. The readings of the meter will determine the electricity charges to be paid by the consumers to TNB.

I

[72] These metal clamps are not part of TNB's meter. It is irrefutable that the function of the metal clamp is to circumvent and/or interfere with the actual reading or recording of the electricity consumption by TNB's meter. The use of a metal clamp is intended to be a non-permanent form of tampering with TNB's meter, as it is easily removed to avoid detection.

[73] In this regard, we adopt and endorse the observations in the following cases:

(i) *Sumbang Projeks Sdn Bhd v. Tenaga Nasional Bhd* [2014] 4 CLJ 323; [2014] MLJU 1813; CA

> [6] *The purpose of the "clamp" was to interfere with the electricity meter by deviating electricity current away from the meter recording device that had been installed there and to obstruct the said meter from recording the accurate flow of electricity. These actions violated sections (sic) 37(1), 37(3) and 37(14) of the Electricity Supply Act 1990.*
>
> …
>
> …
>
> [23] The learned judge also found that the defendant failed to challenge SP1's and SP2's evidence on discovery of the clamp at the TTB near to the main switch board and that *the clamp was effective, when installed at the place it was discovered, in distorting the recording of electricity flow to the meter reading devices.* (emphasis added)

(ii) *Tenaga Nasional Bhd v. City Edible Ice Sdn Bhd* [2016] 1 LNS 1115; [2016] MLJU 913; HC

> [26] Lebih penting lagi, *ujian yang dijalankan selepas clamp ditarik keluar dari TTB memberi bacaan peratusan arus yang tidak direkodkan oleh meter hanya sebanyak +-2% sahaja, berbanding dengan -90%, sepertimana yang dinyatakan di atas, sebelum clamp dikeluarkan dan usikan masih berlaku.* Peratusan +-2% adalah ralat yang boleh diterimapakai. Pada pendapat Mahkamah ini jelas merumuskan bahawa pintasan oleh clamp adalah usikan kepada pepasangan meter tersebut yang mengakibatkan sebahagian besar arus elektrik tidak dapat direkod oleh meter. *Arus yang gagal direkod oleh meter sebanyak 90% tersebut adalah disebabkan pintasan melalui clamp yang berlaku kepada TTB.*
>
> [27] Oleh yang demikian, pembelaan Defendan bahawa gangguan atau usikan kepada TTB tidak memberi kesan kepada meter adalah tidak bermerit. … *Sekiranya terdapat pintasan di TTB, seperti mana yang berlaku dalam kes ini, arus dari TTB tidak dapat menuju ke meter utama. Arus sebaliknya hanya berlegar di TTB tanpa meninggalkan TTB.* Walau bagaimanapun, ini tidak bermakna tiada langsung arus yang berjaya sampai ke meter utama dari TTB. Di dalam pemeriksaan balas beliau, SP3 menjelaskan terdapat sedikit arus yang direkod

oleh meter kerana pintasan tidak semestinya menahan keseluruhan arus dari menuju ke meter utama dari TTB. *Ini adalah bergantung kepada kekuatan pintasan yang melakukan usikan tersebut.*
(emphasis added)

(iii) *Megahock Pipes & Profile Manufacturing Sdn Bhd v. TNB & Another Appeal* [2018] 1 LNS 2177; [2018] MLJU 2013; HC:

[8] The inspection team had found a device which was called a "clamp" attached, or rather, "plugged-in" to the bottom of the Test Terminal Block ("TTB") and held or wedged in place with a short PVC pipe between the TTB and the ground. The clamp was little more than an improvised plug-in device to by-pass the circuitry in the normal flow of electricity comprised in the TTB.

*[9] The bottom cover of the TTB had apparently been reversed, shifted or realigned in such a way as to open up holes or spaces to allow for the clamp to be inserted through those holes/gaps presented, which purpose was to create a by-pass and thwart the correct recording of the ac*tual usage or consumption of electricity passing through the TTB.
(emphasis added)

(iv) *Tenaga Nasional Bhd lwn. Oscar Canary Sdn Bhd* [2016] 1 LNS 1850; HC

[29] Bagi pemeriksaan yang dibuat ke atas premis kedua Defendan (Lot 262, Jalan Kuala Selangor, Batu 22, Mukim Ijok, 45620 Bestari Jaya) pasukan SEAL Plaintif telah diketuai oleh SP1. Keterangan SP1 di dalam pemeriksaan yang telah dijalankan ke atas pepasangan meter di premis kedua Defendan adalah seperti berikut:

29.1 …

29.2 Menurut SP1 lagi, pasukannya seterusnya telah menjalankan pemeriksaan fizikal ke atas pemasangan meter (meter). Hasil pemeriksaan fizikal terhadap meter, pasukannya telah menemui kejanggalan-kejanggalan berikut:

i. tiada sil bit pada panel meter dan panel CT.

ii. *terdapat clamp jenis keris pada Test Terminal Block (TTB).*

iii. *terdapat satu kayu yang digunakan untuk menyokong clamp.*

29.3 Menurut SP1 lagi, pemeriksaan seterusnya mendapati *clamp yang terdapat TTB telah digunakan sebagai bypass TTB menyebabkan meter telah tidak dapat merekodkan bacaan sebenar penggunaan elektrik di premis kedua Defendan tersebut …* (emphasis added)

[74] We reiterate that a factual inference must be based upon relevant evidence, not conjecture and must be such that a rational mind can reasonably draw from it the conclusion that the fact exists. In this regard, it is open to the defence to challenge the inference's reasonableness. The respondent is at liberty to adduce direct or circumstantial evidence during the

trial that would break the obvious connection between consumption of the electricity and the inference that the meter had been tampered with and caused the diversion and the inference could be reasonably and logically drawn. It is incumbent upon the court to resolve conflicts in the testimony, to weigh the evidence from all angles and perspective and determine whether the inferences are reasonable based upon the combined effect and cumulative force of all the evidence adduced before the court.

[75] For all the above reasons, our answer in respect to the following specific questions of law in each appeal as follows:

(i) Question No. 1 in Civil Appeal No. 02(f)-34-05-2018(W): In the affirmative

(ii) Question No. 4 in Civil Appeal No. 02(f)-23-03-2020(B): In the affirmative.

The Limitation Point

[76] This point relates to question no. 3 in Civil Appeal No. 02(f)-23-03-2020(B) which reads:

> Whether limitation under section 6 of the Limitation Act 1953 starts to run from the date the meter was alleged to have been first tampered with or from the date meter tampering was alleged to have been discovered.

[77] Paragraph 6(1)(a) of the LA 1963 provides:

> (1) Save as hereinafter provided the following actions shall not be brought after the expiration of six years from the date on which the cause of action accrued, that is to say:
>
> (a) **actions founded on a contract or on tort;**
>
> (b) actions to enforce a recognisance;
>
> (c) actions to enforce an award; and
>
> (d) actions to recover any sum recoverable by virtue of any written law other than a penalty for forfeiture or of a sum by way of penalty or forfeiture.
>
> (2) An action for an account shall not be brought in respect of any matter which arose more than six years before the commencement of the action (emphasis added)

[78] Learned counsel for the respondents submitted that TNB's cause of action starts to run from the date the meter was alleged to have been first tampered with and not from the meter tampering was alleged to have been discovered. According to learned counsel, sub-s. 38(3) of the ESA 1990 provides that TNB is entitled to claim for loss of revenue due to the "offence committed" under sub-s. 37(1), (3) or (14) of the ESA 1990 and not due to the offence discovered.

[79] In our view, the issue is not an open question in the sense that the issue has been settled by the pronouncements of our courts in a series of cases. Our courts have consistently found that civil cause of action under sub-ss. 38(3) to (5) of the ESA 1990 only occurs upon TNB's discovery of the meter tampering during the inspection under sub-s. 38(1) of the ESA 1990.

[80] We think, it is sufficient in this judgment, for us to refer to the case of *Pahlawan Sdn Bhd v. Tenaga Nasional Berhad*, Civil Appeal No. J 01(IM)-455-2100 where the Court of Appeal in its "broad ground" dated 6 July 2011 said:

> On 14.10.2003, the plaintiff conducted an inspection on the electricity meter at the defendant's premise. The inspection revealed that the meter was tampered with, thus causing it to fail to record the correct usage of electricity …
>
> We held that the cause of action accrued on 14.10.2003 ie, when the plaintiff found the meter was tampered with, and not on 20.1.2010 when the defendant denied liability. In the circumstances of the case, and since the plaintiff commenced the action on 2.3.2010 that is after the 6 years period, the plaintiff's action therefore was barred by limitation. Hence we allowed the appeal.

[81] In this regard, it is pertinent to note that the cause of action envisaged under sub-ss. 38(3) and (5) of the ESA 1990 is a statutory claim, where the right to recover or the relief is specifically stipulated therein. The cause of action is independent of any common law claim for tort or breach of contract. There is no rhyme or reason for us to depart from the earlier court decisions on this issue.

[82] As a result of these considerations, we answer the said question 3 in Civil Appeal No. 02(f)-23-03-2020(B) as follows: That the cause of action starts from the discovery of meter tampering. Limitation period starts therefrom onwards.

The Remedy Point

[83] This point concerns question 2 in Civil Appeal No. 02(f)-34-05-2018(W) that reads:

> Whether TNB's method of calculation for back billing and expenses under Section (*sic*) 38(4) ESA 1990, upon its discovery of meter tampering, entitles the Court to either grant the full sum claimed by TNB as loss of revenue and expenses, or should the Court make an order for damages to be assessed to take into account any significant errors in the calculation?

[84] The point also relates to question 2 in Civil Appeal No. 02(f)-23-03-2020(B) which reads: A

> Whether significant errors in TNB's calculation for loss of revenue will lead to a dismissal of TNB's claim or whether the court should substitute an alternative amount of the claim?

[85] The issue arises in a situation where, upon proof of meter tampering, there are "significant errors" in TNB's calculation of its loss of revenue. The question is whether, taking into account the significant errors, the court can still order an alternative relief of damages suffered by TNB to be assessed. B

[86] The determination of this issue begins with the similar reference to the decision in *Ichi-Ban* (*supra*) where it was accepted that loss of revenue due to meter tampering may be difficult to assess due to evidential difficulties, but damages may still be awarded. It was held that in the absence of precise evidence, approximation or estimation may be used to prove the loss, provided that it is reasonable and fair. It was made clear that "The court must determine the damages as best as it could" and that evidential difficulties in the assessment of damages is not a bar to the court awarding damages. C D

[87] Learned counsel for Tetangga Bahagia however pointed out that *Ichi-Ban* (*supra*) did not go on to lay down any rule or guideline to assist in the aforesaid determination except to say that it would depend on the quality of the evidence adduced in court to support the approximation or estimation. E

[88] We were invited to lay down such rules or guidelines as to when TNB's approximation or estimation would *prima facie* be unreasonable and unfair, in particular if: F

(i) TNB's estimation of the consumers' average electricity usage during TNB's claim period is not reflective of or consistent with the consumer's actual average usage outside TNB's claim period and there is no evidence of any extraordinary electricity usage during TNB's claim period to justify TNB's high estimate; G

(ii) There are inspections carried out by TNB after the date selected by TNB as the date when meter tampering commenced and these inspections confirm that the meter is in good condition and untampered. In other words, TNB can only claim loss of revenue in respect of the period between the last two inspections; and H

(iii) There are obvious errors in the calculation of TNB's estimation.

[89] We agree with TNB that since the ESA 1990 is silent on the methodology to be used by TNB to calculate the loss of revenue it suffered due to meter tampering, Parliament has left the process of ascertainment to TNB because of the difficulties inherent in this type of claim. The same issue was raised in *Ichi-Ban* (*supra*) and this is what this court had to say: I

A [71] According to the learned counsel, as the Act is silent on the methodology to be used by TNB to calculate the loss of revenue suffered due to meter tampering, Parliament has left the process of ascertainment to TNB because of the difficulties inherent in these types of claims. It is important to appreciate the reality of the situation under which the claim is made. In a meter tampering case, all the information is with the B consumer because the incident takes place at his premises. In most cases, the consumer will be uncooperative. The High Court in the *Ichi Ban* case (*supra*) recognised this when it observed as follows:

The Legislature has taken cognizance of the fact that in a claim under section (*sic*) 38(3) "the plaintiff has to work very much in the dark to figure C out the loss as all particulars of the actual and real usage of the electricity is with the defendant.

…

[86] Reverting to the issues raised relating to the calculation point, due to the nature of the claim, we appreciate that there may be difficulty in D obtaining the evidence for the claim under section 38 of the Act. Nevertheless, in our view, it would be unwise for us to use this occasion to say anything which might be taken as specifying or limiting the nature and extent of the evidence necessary to establish a claim for loss of revenue under section 38 of the Act. Where precise evidence is available, as for example if there is a special device to measure the loss of revenue E due to tampering of electricity supply, naturally the Court expects to have it, but where it is not the Court must do the best it can. In other words, there could be other evidence *in lieu* of precise evidence. For example, approximation or estimation may be used provided it is reasonable and fair. This would depend on the quality of the evidence adduced in Court to support that approximation or estimation. In light of what we have said F thus far, we find it unnecessary to answer the two questions posed.

[90] It was further submitted by learned counsel for TNB that the question framed by consumers under the calculation head with regard to the method of calculating the loss of revenue is vague and that by the very nature of the claim, it is reasonable for the court to accept the methodology adopted by G TNB to calculate the back billing from the point of 'sudden drop'.

[91] Counsel went on to submit that for such a claim, it is neither possible nor logical to expect TNB to provide an accurate calculation of the revenue loss suffered. We were referred to the following authorities to support the H contention that this method of back billing has been accepted and adopted by the courts over the years:

(i) *Tenaga Nasional Bhd v. Arkitek Urbanisma Sdn Bhd* [2011] 10 CLJ 796 where it was held by the High Court:

I

[15] Saksi-saksi perayu telah menjelaskan bagaimana mereka menyediakan bil ke belakang seperti berikut. Bagi akaun pertama, ralat yang direkodkan adalah 64.51% dan bagi akaun kedua, ralat yang direkodkan ialah 100%. Ini bermakna perayu mengenakan caj kepada responden kurang 64.51% daripada jumlah sebenar penggunaan elektrik. Ini juga bermaksud apa yang telah dibilkan kepada responden hanyalah sebanyak 35.5% sahaja daripada keseluruhan penggunaan elektrik. Dengan penjelasan itu, mahkamah ini mendapati bahawa perayu telah mematuhi prosedur-prosedur yang ditetapkan di bawah peraturan 6.1.0 di atas dan kiraan yang dibuat mestilah dianggap betul dan tepat, kecuali dibuktikan sebaliknya oleh responden. Tidak keterlaluan jika saya katakan adalah mustahil untuk responden mempertikaikan amaun yang dituntut kerana dalam kes sebegini hanya pekerja perayu (TNB) sahaja yang tahu dan layak membuat kiraan. Bukannya responden ataupun mahkamah. Maka atas fakta ini, responden tidak berhak mempertikaikan atau menyoal kesahihan amaun yang dituntut oleh perayu.

(ii) *Tenaga Nasional Berhad v. Claybricks & Tiles Sdn Bhd* Guaman No. 23NCVC-96-2011 where the Court of Appeal affirmed the decision of the High Court which had held as follows:

At the outset, it is pertinent to observe that the defendant is not disputing the fact that the billings for the period from September 2004 to May 2005 are significantly lower than the period immediately after 11.5.2005. This fact is clearly illustrated in the consumption graph (p 292 Bundle A) which shows a sudden drop in the readings between 28.9.2004 and 11.5.2005. The billings after 11.5.2005 appear to be significantly higher and fairly consistent thereafter …

PW3's evidence on the computation of the loss of the revenue was based on the LPC report by PW1. PW1 took readings taken from the main meter and the check meter before coming to his conclusion that the average readings showed deficiency of -67.67&. Even though PW3 was cross-examined extensively on the computation of the loss of revenue, PW3's evidence was consistent and credible.

The plaintiff's claim for loss of revenue is made under Section (*sic*) 38(3) of the Act. It provides that in the event of any tampering, the plaintiff shall be entitled to require the defendant to pay for the loss of revenue and any expenses incurred by the plaintiff. Pursuant to subsection (4), the statement (exh. P1) produced by PW3 shall be *prima facie* evidence of the payment that has to be made by the defendant. Such amount due shall be recoverable by civil action in court pursuant to subsection (5). As the statement constitutes *prima facie* evidence of the payment due to the plaintiff, it falls upon the defendant to rebut this *prima facie* evidence.

A

> The defendant failed to show that there was any manifest error on the face of the statement, neither did the defendant satisfy the Court that the consumption of electricity during the period in question was significantly lower due to lower production or at all. On the contrary, PW3's evidence was clear, concise and consistent throughout. Accordingly, the court finds that the defendant has failed to rebut statement produced by PW3 showing the amount of the loss of revenue.

B

[92] TNB gave another reason why leave question 2 is irrelevant and does not require any answer by this court. This is because the question presupposes that there was a finding of an error in the calculation of the back-billed amount when there was no such finding by the High Court and the Court of Appeal. We agree. As neither the trial judge nor the Court of Appeal made any finding of any error in the back-billing computation, the question should be dismissed accordingly.

C

D

[93] Following from the aforesaid exegesis, our answers to the specific question of law in each appeal as follows:

(i) Questions no. 2 in Civil Appeal No. 02(f)-34-05-2018(W): We decline to answer the question as it is not confined to issues of law as they raise factual and evidential issues.

E

(ii) Questions no. 2 in Civil Appeal No. 02(f)-23-03-2020(B): We decline to answer the question as it is not confined to issues of law as they raise factual and evidential issues.

The Aggravated/Exemplary Damages Point

F

[94] This point concerns question 4 in Civil Appeal No. 02(f)-34-05-2018(W) which reads:

> Whether aggravated or exemplary damages must be pleaded for the Court to order it as a relief to the successful party?

G

[95] It is not disputed that TNB did not pray for exemplary damages.

[96] This issue arises from damages awarded from the finding of liability against Evergrowth. The High Court found that the conduct of Evergrowth was totally unacceptable and felt that the court must show its abhorrence to such practices by commercial enterprises which steal electricity. Hence, the High Court awarded TNB exemplary damages in the amount of RM200,000.

H

[97] The Court of Appeal treated the award of exemplary damages as aggravated damages. In this regard, the Court of Appeal observed as follows:

I

[35] Learned Counsel for the Plaintiff conceded that the Plaintiff did not claim for aggravated damages in its statement of claim.

[36] In our considered view, there was no basis for the learned Judicial Commissioner to award aggravated damages against the Defendant. The Plaintiff's claim was a claim for pure loss of revenue as a result of the tampering of the meter.

[98] The basis of the Court of Appeal's decision is simply that TNB did not specifically plead for aggravated and/or exemplary damages in its claim against Evergrowth.

[99] Before us, citing the case of *Rookes v. Barnard* [1964] AC 1129 ("*Rookes*"), learned counsel for TNB argued that the issue was not whether TNB was entitled to seek exemplary damages without pleading for the relief. He added that the question was whether it was open to the court to grant exemplary damages although not pleaded. Reliance was also placed on *Broome v. Cassell* [1971] 2 QB 354 ("*Broome*") to support the proposition that an order for exemplary damages need not be pleaded for the court to award the same.

[100] In our judgment, there is much force in the argument of Evergrowth's counsel that the Court of Appeal was right to have set aside the award of the exemplary damages. There are three reasons for this.

[101] First, the fact that exemplary damages is punitive in nature in that its aim is to punish the defendant for his conduct which had occasioned a loss to the plaintiff. And which is why exemplary damages is referred to interchangeably as punitive damages. As laid down in *Rookes* (*supra*), exemplary damages is to be awarded in three categories of cases, *to wit*, when it is statutorily provided for, when the loss is occasioned by the oppressive, arbitrary or unconstitutional conduct of government servants and when the defendant's conduct was profit-orientated. It is the last-mentioned category which we are concerned with here and this court in *Ichi-Ban* (*supra*) have categorically stated that in a case of meter tampering, although TNB is entitled to legally pursue a claim for unjust enrichment, there must be a proper and specific plea in the statement of claim that its cause of action is so founded and material particulars that give rise to it must be provided in the pleading. Obviously, the use of the metal clamp to tamper with the meter is an act to profit from the lower usage of electricity, thereby causing wrongful gain to the perpetrator and wrongful loss to TNB. Thus, it is a form of unjust enrichment as envisaged in *Ichi-Ban* (*supra*). However, when we examined TNB's statement of claim, not only was exemplary damages not pleaded but more importantly, the fact giving rise to and justifying the grant of exemplary damages, which with respect, the Court of Appeal had wrongly labelled as aggravated damages, were not pleaded.

[102] Secondly, as held by the Supreme Court of Canada in *Whiten v. Pilot Insurance Co* [2002] SCJ No. 19, although a claim for punitive damages may be awarded in an exceptional case in contract, it must be specifically pleaded because a person should not be punished without adequate advance notice of the charge. That *ratio* was similarly reflected by our Court of Appeal in *Kuan Pek Seng @ Alan Kuan v. Robert Doran & Ors And Other Appeals* [2012] 1 LNS 775; [2013] 2 MLJ 174. Putting aside the reprehensible act of manipulating one's electrical usage, commonly referred to as electricity theft, this reasoning is one which we are moved to uphold as it makes perfect legal sense given the punitive nature of exemplary damages as we had stated above.

[103] Thirdly, as to the case of *Broome* (*supra*), the important point to note is that the pleading in that case had already been amended to expressly claim for exemplary damages. For this reason, the observation made in that case to the effect that an order for exemplary damages need not be pleaded was only an *obiter* statement.

[104] Based on all the foregoing reasons, we answer question 4 in Civil Appeal No. 02(f)-34-05-2018(W): In the affirmative.

The Energy Commission's Guidelines Point

[105] This point concerns question 3 in Civil Appeal No. 02(f)-6-02-2021(J) and question no. 1 in Civil Appeal No. 02(f)-8-02-2021(J) which read:

> Whether in adjudicating the fairness and reasonableness of the loss of revenue claimed by the Respondent, the Energy Commission's Guideline and the compliance thereof in computing the loss of revenue is an overriding consideration that excludes the consideration of other contrary evidence which may vitiate the operation thereof and the sum that may be lawfully claimed?

[106] The issue arose from the Court of Appeal's decision to allow TNB's claim in full upon making the following finding:

> On the issue of quantum, with respect we disagree with the learned JC in reducing TNB's claim to a 3-year period and awarding damages in the sum of RM2,392,287.25. In our judgment the calculation for the loss of revenue is as submitted by TNB in that the computation for loss of revenue is calculated based on an estimation and the Guideline by the Energy Commission. Hence the method of calculation for 92 days from 1/10/2014 until 1/10/2015 and duly certified by PW6 as a fair, acceptable and reasonable method and the period claimed is in accordance with the Energy Commission Guideline …

[107] What Megahock sought to establish was that TNB's compliance with the EC's guideline in respect of the calculation for loss of revenue does not prevent the court from considering the contrary evidence in respect of the TNB's back billing period for the loss of revenue claimed under sub-ss. 38(3) to (5) of the ESA 1990.

[108] It was contended that the EC's guideline cannot purport to be carved in stone and used as a tool of oppression and extortion against the consumers. It was submitted that compliance with the EC's guideline does not render TNB's claim conclusive as they merely provide considerations to be considered by the court, citing *Norbis v. Norbis* (1986) 65 ALR 12; HC. The following passage in the judgment was quoted in support:

> The distinction between such a guideline and a binding rule of law, through essential, may be thin in practice. But the distinction must be maintained and a failure to apply the guideline cannot be treated as an error in law: a failure to apply the guideline is no more than a factor which warrants a close scrutiny of the particular exercise of the discretion. What cannot be shut out is the discretion of a primary judge not to apply the guideline when the circumstances of the particular case show that its application would produce an unjust or inequitable result or that another approach would produce a more just and equitable result.

[109] TNB's contention again was that it is not necessary for this court to answer the question, for the following reasons:

(i) It is well-established that an action to recover loss of revenue due to meter tampering is a civil claim under sub-ss. 38(3) to (5) of the ESA 1990, ie, to prove on the balance of probabilities which requires a party to "lead and adduce affirmative evidence to prove his case, as the court shall presume the absence of those circumstances, to reach a level of proof of at least 51% probability against his adverse party";

(ii) The question deals with the specific circumstances where TNB relies on the EC's guideline to ascertain its back-billing period for its calculation of loss of revenue. This is not a regular occurrence. This issue should be dealt with on a case-by-case basis;

(iii) The question presupposes that, upon TNB's reliance on the EC's guideline, our courts are in the practice of ignoring other material evidence in respect of TNB's calculation for loss of revenue. It was submitted that this assumption is not true and does not even arise in the Megahock appeals; and

(iv) The question assumes the availability of "other contrary evidence which may vitiate the operation thereof and the sum that may be lawfully claimed". Whether there exists evidence which purports to override or outweigh TNB's reliance on the EC's guideline is clearly a question of fact and does not require a determination by this court. Moreover, the question is vague and ambiguous in respect of the evidence which purports to override or outweigh TNB's reliance on the EC's guideline.

[110] It is axiomatic that a consumer must pay for the electricity it consumes (see: *Tenaga Nasional Bhd v. AWP Enterprise (M) Sdn Bhd* [2015] 1 CLJ 400; CA and *Rehanah Mahmood v. TNB* [2016] 1 LNS 580; HC). Once meter tampering is proved, the court must determine the loss of revenue suffered by TNB and recoverable against the consumer. This has to be so as the principle is that TNB's consumer must pay for the electricity consumed and not be allowed to benefit from the tampering of meters to pay less (see: *Tenaga Nasional Bhd v. Ternakan Air Wui Kyee Sdn Bhd & Another Appeal* [2015] 5 CLJ 955; CA).

[111] If, despite proof of meter tampering, TNB's claim is to be completely dismissed, it would result in TNB having to unnecessarily and unfairly suffer from the mischief that Parliament had intended to protect it from. The remedy expressly provided by s. 38 of the ESA 1990 to protect TNB's interests against meter tampering would thus be rendered nugatory.

[112] Thus, if the court finds that there was a significant error in TNB's calculation for loss of revenue, an order for damages to be assessed may be made, taking the error into account of course (see: *Dream Property Sdn Bhd v. Atlas Housing Sdn Bhd* [2015] 2 CLJ 453; FC and *Melawangi Sdn Bhd v. Tiow Weng Theong* [2020] 4 CLJ 1; FC). This is consistent with this court's observations in *Ichi-Ban* (*supra*) that "the fact that assessment is difficult due to the nature of the damage is no reason of awarding no damages or nominal damages … The court must determine the damages as best as it could."

[113] Subsequent to the aforementioned reasonings, our answers to the specific question of law in each of the appeal as follows:

(i) Question no. 3 in Civil Appeal No. 02(f)-6-02-2021(J): We decline to answer the question as it is not confined to issues of law as they raise factual and evidential issues.

(ii) Question no. 1 in Civil Appeal No. 02(f)-8-02-2021(J): We decline to answer the question as it is not confined to issues of law as they raise factual and evidential issues.